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Mark Niles

Naomi Mezey

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# Screening the Law:

## Ideology and Law In American Popular Culture

Naomi Mezey\*

Mark C. Niles<sup>+</sup>

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\* Associate Professor, Georgetown University Law Center. B.A., Wesleyan University, 1987, M.A., University of Minnesota, J.D. Stanford University, 1995.

<sup>+</sup> Professor and Associate Dean for Academic Affairs, American University, Washington College of Law. B.A., Wesleyan University, 1988; J.D., Stanford University, 1991. The authors wish to thank Muneer Ahmad, Pamela Bridgewater, Christine Haight Farley, Mitu Gulati, Lisa Heinzerling, Vicki Jackson, Jason Loviglio, Penny Pether, Nina Pillard, Mike Seidman, Rebecca Tushnet and Leti Volpp for their comments on earlier drafts, as well as the extremely helpful suggestions received at the Georgetown Summer Workshop and the Virginia/Georgetown Junior Faculty Exchange. We are especially indebted to our research assistants: Kim Einzig, Emily Friedman, Brian Frye, Jette Gebhart, Melissa Millikin, Andrea Stover, Sarah Westergren, Carol Willette and Debra Wolf.

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*"With regard to the screen, the critical and the receptive attitudes of the public coincide."* – Walter Benjamin<sup>1</sup>

*"You know, so much of the time we are just lost. We say please, God, tell us what is right, tell us what is true. There is no justice. The rich win, the poor are powerless. . . . We doubt ourselves, we doubt our beliefs. We doubt our institutions. And we doubt the law."* – Frank Galvin in *"The Verdict"*<sup>2</sup>

*"I can't believe it, the system works!"* – Lisa Simpson in *"The Simpsons"*<sup>3</sup>

## INTRODUCTION

Imagine for a moment you are watching television: a detective you know and trust from previous episodes brings a young black man into the interrogation room to tell him that his friend has already confessed, implicating him; the detective lets him know they have good prints. You can usually tell by casting and costume, and sometimes by musical score, whether they have the right guy, and if they don't, you know he won't go to jail. If they do have the right guy, he probably will go to jail. If he doesn't, it will be because of some identifiable and fixable failing in the legal process. You know when the show begins how it will end, you have the formula memorized without even thinking about it; the fun is in how you get there, or perhaps in the comforting familiarity itself. Now imagine watching a similar scene in a movie theater. Depending on the kind of film and the director, there may be considerably less confidence about the defendant's guilt or innocence, and if those are established, there are usually still more narrative possibilities. The guilty might go free and the innocent might still be implicated. In its portrayals of criminal law and civil law alike, film offers the possibility of less sanguine images of law's failures.

This Article is an attempt to think critically about the pop cultural life of law, to investigate the legal and ideological messages that cultural images of law bear, and to explore how, why and to what extent television and film differ in their portrayals of law. While many legal scholars have addressed the legal content of popular culture in recent years, few have explored the field expansively or interrogated the significant differences in the images of law and legal institutions produced in the different popular media. Some scholars have traced one legal theme through popular culture generally, others have focused on one legal theme within either film or television or literature, and most take one or two specific popular texts as the

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1. WALTER BENJAMIN, *ILLUMINATIONS* 234 (Hannah Arendt ed., Harry Zohn trans.) (1969).  
 2. *THE VERDICT* (Fox 1982) (From the closing argument of Attorney Frank Galvin).  
 3. *The Simpsons: Mr. Lisa Goes to Washington* (Fox television broadcast, Sept. 26, 1991).

subject of their investigation. In this article we take seriously the differences in legal content between film and television and attempt a broader and more theoretically-informed account of the differences and similarities between the these two important media.

American popular culture is saturated with legal themes. The "courtroom drama" has been a staple of American commercial cinema for more than 60 years.<sup>4</sup> "Private eye" and "cop" shows, and the "lawyer" shows they spawned, have always been reliable dramatic devices well suited to network television.<sup>5</sup> These shows have proliferated in recent years to the effective exclusion of other dramatic television genre.<sup>6</sup> As Lawrence Friedman has quipped, "television would shrivel up and die without cops, detectives, crimes, judges, prisons, guns, and trials."<sup>7</sup> Furthermore, law and legal issues play a central though sometimes subtler role in the plot development of an impressive percentage of the films and other television shows produced by mainstream Hollywood studios and producers every year.<sup>8</sup>

There are various explanations for the prevalence of legal themes in modern American popular culture, including the profit motives and inertia of popular culture producers.<sup>9</sup> It has never hurt that legally themed shows, and most notably

4. See generally PAUL BERGMAN & MICHAEL ASIMOW, *REEL JUSTICE* (1996).

5. See discussion *infra* pp. 114-33.

6. Of the thirty seven original dramatic shows aired by the four major networks in the 2003 Fall season, thirty-one (*CSI*, *CSI Miami*, *Third Watch*, *Skin*, *NYPD Blue*, *Navy NCIS*, *the Guardian*, *Judging Amy*, *Law & Order*, *Law & Order: Special Victims Unit*, *Law & Order: Criminal Intent*, 24, *Karen Sisco*, *The Brotherhood of Poland New Hampshire*, *Ed*, *The West Wing*, *Threat Matrix*, *Without a Trace*, *Tru Calling*, *The O.C.*, *JAG*, *The Handler*, *Miss Match*, *Boomtown*, *LA Dragnet*, *Hack*, *The District*, 10-8, *Alias*, *The Practice* and *Lyon's Den*) had elected officials, lawyers, police officers, former police officers who are now vigilantes, or forensic officials as main characters. Of some of the remaining dramatic shows, one is the longest running television drama (*ER*), two involve the lives of high school age children (*Joan of Arcadia* and *Boston Public*) while the other (*American Dreams*) is the kind of family-centered story that dominated the television dramatic genre for the decades prior to the current saturation of legal themes. While still closely following this recent trend with new shows like *Boston Legal* (a spin-off of the cancelled *The Practice*) and the expansion of the *CSI* franchise to *CSI New York*, it is noteworthy that the 2004 network schedule has brought back two old and recently abandoned staples: the evening soap opera and the medical drama. ABC's successful *Desperate Housewives* and Fox's *House*, *M.D.* have the distinction of being among the first new major network dramas without a lawyer or a law enforcement or government official as a main character in more than five years.

7. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1588 (1989).

8. Of course the thematic primacy of law is not restricted to film and television. Law is also an overwhelmingly common subject of American mass-produced fiction. The stunning success of author John Grisham, whose work focuses almost exclusively on legal practice and the personal and professional lives of lawyers, as well as the popularity of other authors whose work addresses some aspect of the law, like William Patterson, Jonathan Harr, Scott Turow and Brad Metzler, demonstrate that the prevalence of legal themes in the visual media is merely part of a much larger phenomenon. See J. Thomas Sullivan, *Imagining the Criminal Law: When Client and Lawyer Meet in the Movies*, 25 U. ARK. LITTLE ROCK L. REV. 665 (2003); Rennard Strickland, *The Cinematic Lawyer: The Magic Mirror and the Silver Screen*, 22 OKLA. CITY U. L. REV. 13 (1997); David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 MARQ. L. REV. 471 (1999).

9. The most obvious explanation relates not to the content of legally themed shows, but to their price-to-appeal ratio. The standard narrative is inherently gripping, usually involving passionate disputes that often arise out of events with particular voyeuristic appeal like illicit sexual activity and interpersonal violence. Also, in the dominant pop culture medium of television, there are structural

courtroom dramas, are relatively easy and cheap to produce.<sup>10</sup> Yet purely economic accounts of the abundance and appeal of legal themes in popular culture bypass the nature of that appeal.

One focus of this article is the nature of that appeal and the possible cultural and ideological meanings that attach to these pervasive images of law. Millions more people watch trials or oral arguments in *Ally McBeal*, *Law & Order*, *A Few Good Men*, *Liar Liar*, *The Practice*, or even short lived shows like *First Monday* or *The Court*, than will ever visit a real court, attend an oral argument in the Supreme Court, or even have the faintest idea of what actually goes on there. This is not to suggest that all or even most of the viewers of these shows will assume that the depictions of law they see in popular culture are completely or even essentially accurate. While many will likely make just this assumption,<sup>11</sup> many others will see

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forces which serve to produce and perpetuate law and law enforcement related programming, including common sense assessments of relative profitability of available options. Television executives in charge of programming their network schedules are, like any other risk adverse decision-makers, more likely to replicate an existing format that has proved successful than to attempt to blaze a new trail with something innovative. Based on these same conservative impulses, television executives are likely to seek programming from producers and artists who have a track record of success, regardless of substantive content. So, for example, when producers like Dick Wolf, or Steven Bochco, and then his protégé David E. Kelley, develop hit shows like *Law & Order*, *Hill Street Blues* and *LA Law*, it is no surprise that network executives would return to these producers (again and again) when looking for new series. And it is equally predictable that these producers would seek to replicate their own success by not straying too far from what has made them successful, leading them to produce still more legally-themed shows. So a decade after the success of their initial (or early) hits we get four or five more versions of *Law & Order* from Wolf, *Cop Rock*, *Murder One*, and finally *NYPD Blue* from Bochco, and *Picket Fences*, *Ally McBeal* and *The Practice* from Kelley. Yet clearly these factors alone cannot explain the prevalence of legal themes in popular culture. Many of the realities listed above apply to other genres of television programming that nonetheless do not currently overwhelm network schedules in the same way that law and law enforcement shows currently do. Some cheap and appealing shows, such as family dramas or evening soap operas, once dominated the network television landscape but have now seemingly disappeared.

10. The courtroom motif makes for easy script organization (with a natural sequence of opening argument, examination of witness, closing arguments, and the dramatically tidy jury verdict) that fits seamlessly into the cinematic three-act structure. The common screenplay format begins with the first act which introduces the characters, a second act which provides complications and obstacles for the main character or characters to deal with, and a third act which depicts the resolution of these complications or the circumvention of these obstacles. See LINDA SEGER, MAKING A GOOD SCRIPT GREAT (2d ed. 1994). Courtroom dramas in particular are also inexpensive in the sense that much of the shooting can take place in a studio on a set that is generic and simple to construct rather than on location (with people telling the audience what happened without the show's producers paying many more actors and technicians to show them).

11. In discussing the impact of media depictions of legal structures and institutions on a general public already uncertain about their effectiveness, Kevin Ho observed:

[u]nfortunately, it appears likely that members of the public will be even more reluctant to access the legal system after they have been exposed to the negative depictions of both the law and the legal actors often seen in the contemporary media. Furthermore, when this reluctance is considered in light of the fact that entertainment value is paramount in popular media, the prospects for an actual increase in the general public's knowledge of the legal system seem even more dismal. References to the law in popular media, while pervasive, are not necessarily accurate. Thus the general public's ignorance of the legal system is reinforced.

Kevin K. Ho, "The Simpsons" and the Law: Revealing Truth and Justice to the Masses, 10 UCLA ENT. L. REV. 275, 275-76 (2003) (citing Friedman, *supra* note 7, at 1594). See also Lucille M. Ponte,

these images for what they are—fictional stories produced by people much more interested in telling a compelling tale than in providing a documentary of our legal system.<sup>12</sup>

We are decidedly uninterested in whether popular culture gets law “right”. As Stanley Fish has rightly argued, images of law in television and film are as much about television and film as they are about law.<sup>13</sup> What we do care about are the uses to which law is put in popular culture. For whatever the level of sophistication the audience brings to these shows, they are nonetheless the dominant images of the law and its institutions that many Americans, within certain demographic categories,<sup>14</sup> will experience.<sup>15</sup> And they are not without their effects on collective expectations, societal myths and the national psyche.<sup>16</sup> So, assuming that we as lawyers and legal scholars ultimately care what the abundant cultural images of our legal system suggest about law and culture, then we need to look closely at the kinds of ideological messages communicated by these pervasive cultural texts.

Since the emergence of the first mass-produced entertainment media, scholars have struggled with similar questions in an effort to make sense of the power of the popular media and to explore their influence on individual consumers and communities. The dominant critical analysis of popular culture, developed by the Frankfurt School in the early twentieth century, has suggested that the primary role

*Reassessing the Australian Adversarial System: An Overview of Issues in Court Reform and Federal Practice in the Land Down Under*, 27 SYRACUSE J. INT’L L. & COM. 335, n. 129 (“Public awareness about the legal system is shaped predominantly by media depictions of the law. Many of these accounts focus on court proceedings and emphasize the dramatic nature of courtroom interaction. This creates an expectation that litigation is the usual way in which the legal system resolves disputes.”).

12. It must be emphasized that while popular cultural depictions of law are pervasive and influential, they don’t necessarily tell us what cultural consumers actually think about what they see and read. As Lawrence Friedman rightly cautions, “What people actually think about law, what they worry about, what they hope for, what they use, what they contend with, are not congruent with what goes into the picture tube, or with what comes out.” Friedman, *supra* note 7, at 1589.

13. Stanley Fish, *Theory Minimalism*, 37 SAN DIEGO L. REV. 761, 769-70 (2000).

14. While there are many different “realities” in peoples’ relationship with and feelings toward the law, race and class are two significant cleavages. For example, most white popular culture consumers from a middle and upper middle class background are overwhelmingly likely to experience our legal system, particularly the criminal justice system, as television and movie viewers. However, recent studies indicate that an alarming percentage of African American males experiences the legal system first hand, usually in the form of incarceration or probation. As one recent editorial noted, as many as 1.4 million African American men were disenfranchised in the 2004 election because they were in prison, on parole or on probation. Ruth Rosen, *Why Can’t They Vote?* SAN. FRAN. CHRONICLE, Feb. 26, 2004, at A21. It would be interesting and worthwhile to investigate the meanings that popular images of our legal system hold for people much more intimately subjected to the law. But that is another article.

15. As Michael Asimow and Shannon Mader observed recently, “Popular culture is even more persuasive than law. All of us swim in a sea of films, television shows, books, songs, advertisements and numerous other imaginative texts. During thirty minutes of watching television, we consume more images than a member of a pre-industrial society would have consumed in a lifetime.” MICHAEL ASIMOW & SHANNON MADER, *LAW AND POPULAR CULTURE: A COURSE BOOK* xxii (2004).

16. See, e.g., Gary M. Stern, *Courtroom Life Imitates Art*, NATL. L.J., July 22, 2002, at A1. (“Legal TV shows, films and books saturate popular culture and are making an impact on jurors’ expectations and the way juries interpret cases, according to several attorneys, jury consultants and law professors. ‘Most people only know about the law as it goes on in a courtroom from seeing it on TV,’ says Robert Thomson, Director of Syracuse University’s Center for the Study of Popular Television.”).

of popular culture in our society is to communicate, promote and perpetuate the "dominant ideology," that worldview which provides a conceptual framework and foundation for a particular social order and which tends to serve the interests of the prevailing power structure. This theory follows a Marxist model and views popular culture as a means of convincing the masses that their interests are aligned with the broader capitalist political and economic agenda. According to this theory, the ideology communicated by popular culture encompasses "distinct biases, interests, and embedded values, reproducing the point of view of their producers and often the values of the dominant social groups," and consequently serves to "reproduce social domination, . . . legitimate rule by the prevailing groups over subordinate ones, and help replicate the existing inequalities and hierarchies of power and control."<sup>17</sup>

Applying this traditional conception to an analysis of the depiction of law in American popular culture produces interesting, though somewhat contradictory results. While instructive, this traditional analysis is insufficient, on its own, to explain why law is depicted the way that it is across the full spectrum of contemporary popular culture. While television images of law frequently do serve to reinforce the dominant ideology in a relatively crude way—providing consistently idealized and mythic images of law and government which support the status quo—many images of law in popular film, in contrast, depict law in a way that calls into serious doubt the ability of law to be neutral and just. This more complex and critical view of law, while still essentially "ideological" in its reliance on a legitimate and authoritative legal order and a common and coherent moral order, calls for a more nuanced analysis than that offered by the earliest popular culture critics.

This paper reevaluates Frankfurt School theory, and other cultural critiques, in an effort to bring a more sophisticated analysis to bear on popular culture depictions of law. Specifically, we invoke the cultural critiques of the Birmingham School in order to assess the more subtle ideological content more often found in film. Our focus here is not only on how popular culture functions as a mechanism for communicating and reproducing ideologies, but, based on a theoretical analysis of what this function is, we ask what images of law and legal justice one might expect to see in popular media, and we assess the efficacy of the theoretical frameworks based on an in depth analysis of the kinds of images that are actually out there and the variety of meanings they communicate. Yet for all the interpretive variety, there is a virtual absence of seriously controversial or oppositional images of law, particularly on television. We partially link this insight to recent media consolidations and suggest the ways in which both the theory and practice of popular culture bear on the issue of media regulation and why they matter to democracy.

In one sense our conclusion, stated in its most basic terms, is that for reasons relating to their idiosyncratic profit and aesthetic structures, the dominance of the

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17. MEDIA AND CULTURAL STUDIES: KEYWORKS 6 (Meenakshi Gigi Durham & Douglas M. Kellner eds., 2001) [hereinafter KEYWORKS].

particular images of law depicted on television—which we refer to as “crudely” ideology-reinforcing, that portray the law as a (if not *the*) primary vehicle for achieving justice<sup>18</sup>—is best explained by reference to the traditional Frankfurt School culture critiques. In contrast, making sense of the more nuanced ideological content of portrayals of law and justice in popular film requires application of the more recent critical structure of the Birmingham School. This second and more complex version of a legal ideology understands the law as fallible, as either ineffective at reaching justice, or worse, standing in the way of it. But this more complex view still understands the law as fundamentally legitimate and authoritative, situated within a coherent moral universe. However, in another sense, we don’t fully subscribe to such a neat alignment of theory and medium. Indeed, the Birmingham School’s insistence on the multiple meanings available in cultural texts forces us to modify a pat conclusion about television’s uniform content. At the same time, the very differences between television and film readings and the force with which the dominant readings of television shows in fact dominate suggest the limits of our theoretical tools.

## II. CULTURAL THEORY

### A. “POPULAR” CULTURE AND “MASS” CULTURE

It is useful to distinguish, at the outset of a discussion of the theoretical critiques of popular culture, between “popular culture” and “mass culture.”<sup>19</sup> Although there are a number of different ways that scholars have defined and differentiated popular and mass culture (a distinction which itself emerged from the evolution of cultural theory rather than presaged it) we provide only a sketch of the full body of critical analysis.<sup>20</sup> Philosophy of Art scholar Noel Carroll provides an effective and

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18. This statement of course assumes that we know what justice means and that we can agree about what it consists of in any given circumstance. While we do not intend to render the notion of “justice” unproblematic, we think that within most television programs and films the narrative generally establishes a set of assumptions about what is just. And yet outside a particular narrative world, what we mean by “justice” when we demand it of law and lawyers is profoundly unclear. In his analysis of popular images of lawyers, Robert Post succinctly and elegantly shows how the very mixed emotions Americans feel toward lawyers captures a deep longing for shared justice and community as well as a contradictory longing for autonomy. Yet as Post makes clear, the betrayal we accuse lawyers of is a betrayal by our own “wildly pluralistic culture” in which we do not share a coherent set of values or a coherent notion of justice. Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 385 (1987). Outside cultural texts, the content of “legal justice” is also shifting and contested. See, e.g., Robin West, *Re-Imagining Justice*, 14 YALE J. L. & FEMINISM 333 (2002).

19. It should be noted that some cultural theorists resist the label “mass art” for its elitist connotations. As Noel Carroll explains, these critics are disturbed that the term tends to carry “a disdain that regards those who do not belong to some mandarin company of intellectuals and modernist aesthetes as part of some shapeless blob. . . . Moreover, this supposedly shapeless blob is comprised, first and foremost, of the working classes and/or the underclass.” NOEL CARROLL, *A PHILOSOPHY OF MASS ART* 186 (1998).

20. For a representative sample of critical and theoretical analyses of popular and mass culture,



accessible definition of mass culture, or what he calls "mass art":

Like the mass manufacture of automobiles, mass art is a form of mass production and distribution, designed to deliver a multiplicity of tokens of a particular artwork to frequently geographically remote mass consuming audiences. Mass art is the art of mass society, predicated on addressing mass audiences by means of the opportunities afforded by mass technologies. Mass art is produced and delivered by mass media. These media are called mass because they make products available to relatively large audiences simultaneously.<sup>21</sup>

While mass culture clearly includes some material that could not be considered "art" under a common understanding of the term,<sup>22</sup> such as mass journalism, Carroll's basic characterization, particularly his focus on the technology and economy of its delivery to a large and heterogeneous audience, is equally applicable to non-artistic mass culture formats.

Carroll goes on to discuss some of the consequences of mass communication on cultural form and content, noting that mass culture "is designed to be easy, to be readily accessible, with minimum effort, to the largest number of people possible," and consequently, "[i]n so far as mass art is meant to capture large markets, it gravitates toward the choice of devices that will make it accessible to mass untutored audiences."<sup>23</sup> "Accessibility" both of form and content is an essential component of mass culture, and perhaps its most readily-defined characteristic. Mass culture is, in essence, the commodities sold by the cultural industries in a capitalist society, whether they are a pair of jeans, a romance novel or a television show.

*Popular* culture, in contrast, is more readily the product of the consumer rather than the producer of culture commodities. As John Fiske describes it,

Popular culture is made by the people at the interface between the products of the culture industries and everyday life. Popular culture is made by the people, not imposed on them; it stems from within, from below, not from above. Popular culture is the art of making do with what the system provides.<sup>24</sup>

In other words, popular culture is what people actually do with mass culture, particularly what they do to adapt and reinterpret mass cultural products according to their needs and desires. Popular culture is neither the production of mass culture nor the passive consumption of mass cultural products. It is "the creative,

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see JAMES CURRAN & MICHAEL GUREVITCH, *MASS MEDIA AND SOCIETY* (3d ed. 2000) and *AMERICAN MEDIA AND MASS CULTURE, LEFT PERSPECTIVES* (Donald Lazere ed., 1987) [hereinafter *AMERICAN MEDIA*].

21. CARROLL, *supra* note 19, at 188.

22. For a full discussion of the various definitions of both "art" and "aesthetics" offered by philosophers from the classical period to the present, see *AESTHETICS: A CRITICAL ANTHOLOGY* (George Dickie et. al. eds., 1977).

23. CARROLL, *supra* note 19, at 192.

24. JOHN FISKE, *UNDERSTANDING POPULAR CULTURE* 25 (1989) (citing MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (1984)).

discriminating use of the resources that capitalism provides."<sup>25</sup> Where mass culture represents the dominant culture, popular culture is cultural consumption that struggles with and against the meanings of mass culture. "All popular culture is a process of struggle, of struggle over the meanings of social experience, of one's personhood and its relations to the social order and of the texts and commodities of that order."<sup>26</sup>

There is, to be sure, an interdependence, even a circulation, between mass and popular culture. Popular culture makes use of the mass cultural resources that capitalism provides, and mass culture often co-opts and markets pop cultural practices. Andy Warhol was making a kind of popular art when he used Campbell's Soup and Marilyn Monroe as his subjects,<sup>27</sup> and those paintings became mass art when they were turned into ubiquitous dorm posters. Fiske uses the example of the young girls who were devoted fans of Madonna and who found a kind of liberatory joy in her music and videos that ran counter to the more conventional patriarchal aspects of the Madonna phenomenon.<sup>28</sup> More recently hip hop culture has evolved as a popular response to the racial exclusions in music production and mass culture, and has in turn inspired mass production and mass consumption of many of its sounds and styles.<sup>29</sup> The first phenomenon is an example of pop cultural reinterpretations of mass cultural products; the second of mass culture's seeking to capitalize on popular culture.

Obviously, we can debate whether in fact her fans read Madonna to be a symbol of female sexual autonomy rather than patriarchal boy toy, and whether that reading was at odds with the dominant understanding of Madonna by those responsible for her creation and distribution as a cultural product. And we can as easily debate the extent to which hip hop is organic popular cultural expression or manufactured style meant to simulate resistant expression. The point is that popular culture looks at the meanings inscribed onto mass cultural products by consumers, and the ambiguities are the result of the interdependence of the two perspectives. The resources of mass and popular culture—television and film as well as music, video games, food, clothing, etc.—convey both the ideological

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25. *Id.* at 28.

26. *Id.*

27. This is not entirely accurate since Warhol was making art in a rather rarified and high-end New York art world rather than making art readily available to many people, but his subject matter was the products of mass culture, and the meaning of his work circulated broadly and in that sense was popular art.

28. FISKE, *supra* note 24, at 95. The debate on the meanings of Madonna is voluminous. See, e.g., DUNCAN KENNEDY, *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (1993); Naomi Mezey, *Legal Radicals in Madonna's Closet: The Influence of Identity Politics, Popular Culture, and a New Generation on Critical Legal Studies*, 46 STAN. L. REV. 1835 (1994) (reviewing *SEXY DRESSING*). Fiske also uses the nice example of the young boys who populated the video arcades in the 1980s, forging their own resistant meanings about the relationship between humans and machines not evident in the more obviously violent and Machiavellian messages of the video games themselves. FISKE, *supra* note 24, at 77.

29. See, e.g., NELSON GEORGE, *HIP HOP AMERICA* (1999); DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE (William Eric Perkins ed., 1995); TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* (1994).

interests of those with power and the meanings made by those who resist that power. "If the cultural commodities or texts do not contain resources out of which the people can make their own meanings of their social relations and identities, they will be rejected and will fail in the marketplace. They will not be made popular."<sup>30</sup>

As the hip hop example illustrates, this symbiotic relationship can also work in the other direction. We see plenty of examples of pop cultural practices that are made into mass cultural products. The subversive subcultures that grew out of surfing and skateboarding in the 1970s, the punk subcultures of the 1980s, and the current hip hop culture are pop cultural practices that have been subsequently appropriated (and largely subdued) by mass culture as those styles were reproduced for mass audiences mainly in the form of fashion and music.<sup>31</sup> But of course, these subcultures were predicated on popular and transgressive meanings attached to mass cultural commodities (like surfboards) in the first place.<sup>32</sup>

Both mass culture and popular culture can likewise be distinguished from folk or artisan culture, in which production and consumption are not disaggregated (the ritual Sun Dance, for example, is performed and attended by the same Lakota Sioux community) and which tend to be divorced from the modes of production and consumption common to high technology and high capitalism. Popular culture can also be distinguished to some extent from "high" culture— theater, opera and the like—which tends to be produced and consumed by the social elite.<sup>33</sup> But the distinctions between high culture and folk culture have broken down considerably as both high and folk cultures circulate through and are dependent on popular and mass culture.

While this description ought to help identify mass culture and popular culture and distinguish them from other cultural phenomena in our society, it doesn't tell us anything about how these categories should be deployed, what kinds of questions they enable, or what sorts of answers they might provide. For our purposes, we are discussing mass culture, but like all mass culture, television and film are always available for popular reinvention and reclamation by their viewers. Thus, when we use the term popular culture in this article, we do not mean it only in the refined sense used by Fiske, but as a short hand for mass-mediated popular culture, television and film that is mostly mass produced but open to popular meanings and sometimes exploited for popular purposes. The distinctions also help take us beyond the simpler notion of culture that was the object of study for the

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30. FISKE, *supra* note 24, at 2.

31. DICK HEDDIGE, *SUBCULTURE: THE MEANING OF STYLE* 95 (1979) ("both mod and punk innovations fed back directly into high fashion and mainstream fashion."). Hip hop video games strike us as a good example of this appropriation.

32. *Id.* at 90-95.

33. "High art" is controversial as both a term and a category. It is used most often to mean those art forms ordinarily consumed by the well-educated elite. *See, e.g.*, HERBERT J. GANS, *POPULAR CULTURE AND HIGH CULTURE: AN ANALYSIS AND EVALUATION OF TASTE* 10 (1974). Carroll, on the other hand, distinguishes high art and avant-garde art from mass art forms not by the class of its consumers but by its purpose, which he claims is to resist easy reception and to stretch or disrupt common sensibilities. CARROLL, *supra* note 19, at 190-91.

first cultural critiques, critiques which are in other ways still relevant to cultural analysis broadly and to the more specific inquiry into the significance of mass-mediated pop cultural portrayals of law.

### B. THE CLASSIC CRITIQUE OF CULTURE: IDEOLOGY & THE FRANKFURT SCHOOL

The theoretical analysis of mass-mediated popular culture and its relationship to the broader society that has arisen in the "Western" world has been dominated by a Marxist and post-Marxist approach which endeavors to situate the phenomenon into a broader picture of society and the economic and political forces that form and control it.<sup>34</sup> The first serious critiques of the new popular culture that arose at the turn of the twentieth century in response to the dynamics of industrialization and urbanization, focused on the relationship between mass culture texts and the individuals and organizations which controlled their production, and how they used them (just as they used everything else within their control) to promote their political and economic interests, and those of their natural allies. These scholars identified the primary role played by popular culture images as the communication, promotion and perpetuation of a dominant societal "ideology" which served the same purpose as other societal, economic or political structures—to further the interests of the powerful.<sup>35</sup>

"Ideology," according to Marx and Engels, was one of the most insidious, and therefore effective, tools used to support the existing capitalist ruling structure. In focusing on its impact, they argued that:

The ideas of the ruling class are in every epoch the ruling ideas: i.e., the class which is the ruling *material* force of society is at the same time its ruling *intellectual* force.

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34. As Donald Lazere writes:

The critical tradition that has dealt most fully with the politics of mass culture is Marxist theory. . . . The most prominent theme in Marxist and other recent left cultural criticism is the way the prevalent mode of production and the ideology of the ruling class in any society dominate every phase of culture, and more specifically, at present, the way capitalist production and ideology dominate American culture as well as the culture of countries throughout the world that have been colonized by American business and culture. In the left view, this domination is perpetuated both through overt propaganda in political rhetoric, news reporting, advertising, and public relations and through the often unconscious absorption of capitalist ideology by creators and consumers in all aspects of the culture of everyday life.

Donald Lazere, *Introduction: Entertainment as Social Control*, in *AMERICAN MEDIA*, *supra* note 20, at 4-7.

35. As Noel Carol argues:

Undoubtedly the reason that contemporary critics in the humanities are so preoccupied with the topic of ideology with respect to mass art rests on their conviction that the propagation of ideology by mass art is a major lever by which oppression is sustained in the modern world. The presiding idea here is that by means of ideology, systems of social domination seize control of the consciousness of citizens in such a way that they find domination acceptable. Ideology may function either to invest people with false desires that come to enslave them and/or function to counterfeit the legitimatization of unjust social practices. Mass art, in turn, is eminently serviceable for the purposes of ideology because it disseminates its tenets so pervasively.

CARROLL, *supra* note 19, at 361.

The class which has the means of material production at its disposal, consequently also controls the means of mental production, so that the ideas of those who lack the means of mental production are on the whole subject to it.<sup>36</sup>

Based on this conception of the control of the means of intellectual production, subsequent theorists observed that popular cultural texts “generate political effects, reproducing or opposing governing social institutions and relations of domination and subordination” and that “all cultural texts have distinct biases, interests, and embedded values, reproducing the point of view of their producers and often the values of the dominant social groups.”<sup>37</sup> Durham and Kellner articulated this concern in their introduction to *Media and Cultural Studies, KeyWorks*:

The concept of ideology thus makes us question the naturalness of cultural texts and to see that prevailing ideas are not self-evident and obvious, but are constructed, biased, and contestable . . . the more one studies cultural forms and representations, the more one sees the presence of ideologies that support the interests of the reigning economic, gender, race, or social groups, who are presented positively and idealized, while subordinate groups are often presented negatively and prejudicially.<sup>38</sup>

Although the Marxist concept of ideology had a deep and lasting impact on the theoretical criticism of popular culture, the true emergence of modern popular cultural criticism post-dated and expanded on Marx. The first serious criticism that focused directly on the popular media came from intellectual descendents of Marx—the so-called “Frankfurt School”—a group of theorists connected with the Frankfurt Institute of Social Research in the 1920s and 1930s, most of whom later fled Nazi Germany and emigrated to the United States. Writers like Max Horkheimer, Theodor Adorno, Herbert Marcuse and Walter Benjamin focused their analysis on what they referred to as the “culture industry” and the societal effects of the demise of authentic, individually-created art and the ascendance of the mass production and mass consumption of culture. The Frankfurt School critique was specifically addressed to mass culture, which, as “the creature of manipulation and imposition from above,”<sup>39</sup> had essentially absorbed folk culture. One of the salient features of this school of criticism was its disregard, or perhaps failure to acknowledge sufficiently, the nuanced distinction between mass and popular culture. “Popular culture,” according to the Frankfurt School, was the name given to mass culture by the culture industry for ideological purposes even though there was nothing either populist or democratic about it.<sup>40</sup>

While these writers did not employ standard Marxist analysis,<sup>41</sup> they were

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36. KARL MARX & FREIDRICH ENGELS, *THE GERMAN IDEOLOGY* 67 (Progress Publishers 3d ed. 1976) (1964).

37. Meenakshi Gigi Durham and Douglas M. Kellner, *Introduction* to *KEYWORKS*, *supra* note 17, at 6.

38. *Id.* at 7.

39. MARTIN JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH 1923-1950* 185 (1973).

40. *Id.* at 216.

41. *Id.* They were equally influenced by Hegel and his notion of dialectical thinking.

sufficiently Marxist to note the important role of ideology in solidifying the power of corporations and the ways in which ideological interests were communicated and embedded in the vending of easily digestible pop cultural products, products whose main purpose was to proliferate an idealized image of the capitalist economic structure and reconcile those who were subordinated through it to their own subordination.

Writing in the United States in the mid-1940s, Adorno and Horkheimer published perhaps the most famous and furious essay against the American culture industry.<sup>42</sup> They saw what was once the individual, artisanal production of art become a monopolistic industry that mass produced not just identical cultural products, but identical cultural consumers.<sup>43</sup> "The culture industry as a whole has molded men as a type unfailingly reproduced in every product."<sup>44</sup> In essence, the culture industry had manufactured a totalitarian society in which real life was merely the disappointing extension of the movie version, and real people were commodities modeled on the commodities they consumed.

In the culture industry the individual is an illusion not merely because of the standardization of the means of production. He is tolerated only so long as his complete identification with the generality is unquestioned. Pseudo individuality is rife: from the standardized jazz improvisation to the exceptional film star whose hair curls over her eye to demonstrate her originality. What is individual is no more than the generality's power to stamp the accidental detail so firmly that it is accepted as such. The defiant reserve or elegant appearance of the individual on show is mass-produced like Yale locks, whose only difference can be measured in fractions of millimetres. The peculiarity of the self is a monopoly commodity . . .<sup>45</sup>

The problem with the eradication of individuality as far as the Frankfurt School was concerned was that without individuals you have no social protest, nor, for that matter, political consciousness. The Frankfurt School's almost universal distaste for mass culture was based on its view that the political power of art—mass art in particular—had found a new and alarming role, that of affirmation rather than critique.<sup>46</sup> "As Marcuse argued in 1937, the segregation of cultural life from its material base served to reconcile man to the inequalities implicit in the latter; idealist, bourgeois culture was in this sense 'affirmative.'"<sup>47</sup> They despaired that the critical elements, or what they called "negative moments" of art and culture, were being eradicated and along with them any awareness of or concern for social

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42. Theodor Adorno & Max Horkheimer, *The Culture Industry: Enlightenment as Mass Deception*, in *THE CULTURAL STUDIES READER* 31 (Simon During ed., Routledge 2d ed. 1999) (1993).

43. *Id.* at 32-34.

44. *Id.* at 35.

45. *Id.* at 40.

46. It is worth noting that whether or not mass art was employed to affirm the power structure or critique it, these writers saw it as "mass culture" in the sense we identify it above, as culture or art whose meanings are essentially controlled by those who produce it with little attention to mediating institutions and no attention to the signifying practices of cultural consumers.

47. JAY, *supra* note 39, at 215.

injustice.<sup>48</sup> Instead, "art in the age of mechanical reproduction served to reconcile the mass audience to the status quo."<sup>49</sup>

As the line blurred between work and leisure, and further between worker, consumer and individual, the ideological role of the culture industry in the reproduction of modern society could not be underestimated. The Frankfurt School theorists were the first to show how "mass culture and communications stand in the center of leisure activity, are important agents of socialization, mediators of political reality, and should thus be seen as primary institutions of contemporary societies with a variety of economic, political, cultural, and social effects."<sup>50</sup>

Alone among the writers associated with the Frankfurt School, Walter Benjamin found something significant in mass culture to be optimistic about. Where the others bemoaned the technological transformation of art into commodity and the loss of what Benjamin called the "aura" or unique existence of a work of art, Benjamin found slightly more promise in "the liquidation of the traditional value of the cultural heritage."<sup>51</sup> Benjamin suggested that the mass reproducibility of art led to a displacement of its "cult value" by its "exhibition value."<sup>52</sup> In other words, where art was once valued for its originality and its ritualistic presence, it is now valued for its public presentability and its mass presence.

In addition, Benjamin saw in this transformation a kind of emancipation from authenticity that could in turn bring new cultural functions and possibilities. One such possibility Benjamin found most vividly in film—that the distance and mediation between audience and performer created by the camera allowed the audience more easily to act as critic.<sup>53</sup> "With regard to the screen, the critical and the receptive attitudes of the public coincide."<sup>54</sup> Benjamin, however, did not think that film would revolutionize the masses. Film shocks at the same time that it requires no attention from its viewers. The public, Benjamin concluded, "is an examiner, but an absent-minded one."<sup>55</sup> Finally, unlike most of his fellow theorists, Benjamin found some virtue in the fact that mechanically reproduced mass culture fundamentally changed the nature of perception itself.

Evidently a different nature opens itself to the camera than opens to the naked eye—if only because an unconsciously penetrated space is substituted for a space consciously explored by man. Even if one has a general knowledge of the way people walk, one knows nothing of a person's posture during the fractional second of a stride. The act of reaching for a lighter or a spoon is familiar routine, yet we hardly know what really goes on between hand and metal, not to mention how this fluctuates with our moods. Here the camera intervenes with the resources of its lowerings and liftings, its

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48. *Id.*

49. *Id.* at 211. Ever dialectical, Adorno argued that so long as social injustice existed in reality, even utopian social portrayals contained the seeds of protest. *Id.* at 179 (citing Adorno, "Theses on Art and Religion Today," *Kenyon Review* 9, 155-62 (1947)).

50. KEYWORKS, *supra* note 17, at 9.

51. BENJAMIN, *supra* note 1, at 223-24.

52. *Id.* at 226-27.

53. *Id.* at 230.

54. *Id.* at 236.

55. *Id.* at 243.

interruptions and isolations, its extensions and accelerations, its enlargements and reductions. The camera introduces us to unconscious optics as does psychoanalysis to unconscious impulses.<sup>56</sup>

With the exception of Benjamin, however, the Frankfurt School expressed deep pessimism about the impact of popular culture on society and concluded that the "culture industries had the singular function . . . of providing ideological legitimation of the existing capitalist societies and of integrating individuals into the framework of the capitalist system."<sup>57</sup>

### C. RETHINKING THE CRITIQUE: AGENCY & THE BIRMINGHAM SCHOOL

Although still a central component of modern critical analysis of mass and popular culture, the Frankfurt School critique has not gone unchallenged. For decades, media scholars have questioned the Frankfurt School's understanding of the culture industries, directing their skepticism at the ability of the industries to effectively impose ideological indoctrination and at the inability of cultural consumers to exercise any independent judgment. Indeed, the very notion of popular culture, as distinct from mass culture, is an implicit critique of the Frankfurt School model, allowing as it does for a negotiation of meaning between cultural producers and consumers.

In the introduction to his anthology *American Media and Mass Culture*, Donald Lazere notes that a significant portion of the mainstream academic analysis of American popular culture has eschewed much of the critical perspective of the Marxist and Frankfurt schools, in favor of a perspective that has been "accepting, often affirmative and even celebratory" of mass media and its impact on society.<sup>58</sup> According to Lazere the "unquestioned assumption" in these and similar analyses of popular culture is that it serves us as a "mirror" that "reflects the values of the people, not the values the producers impose on them."<sup>59</sup>

By regarding the products of the developing technologies of mass communication as more emblematic than coercive, this view offers a serious critique of the Frankfurt School directed at the determinism of its approach. It offers an alternative vision of popular culture in which cultural consumers have agency and power, in which popular culture is a democratic expression of the needs and desires of the masses rather than a means to control and construct these desires. By replacing the top-down model of cultural production and consumption espoused by the Frankfurt School with a bottom-up model, this view offers a twofold critique of Frankfurt School analysis as elitist and insufficiently democratic.

While acknowledging that traditional cultural theory views popular culture as

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56. *Id.* at 238-39. Benjamin's aesthetic appreciation of some mass culture presages the pleasure and *jouissance* that later postmodernists celebrate in it.

57. KEYWORKS, *supra* note 17, at 9.

58. Lazere, *supra* note 34, at 1. Lazere also notes that twentieth century authors Marshall McLuhan, Susan Sontag, Tom Wolfe and Hunter Thompson are sources of this attitude. *Id.* at 2.

59. *Id.* at 3.



"either meaningless escapism or dangerous narcotic,"<sup>60</sup> Jim Cullen, in his book "The Art of Democracy," makes a bottom-up critique of these theorists, arguing:

[they] seriously underestimate the complexity and relevance of those arts most passionately embraced by ordinary working people and their families. The escapist argument, for example, begs the questions of where people escape from, and where they escape to, the varied choices they make in their means of escape, and what those choices reveal about them and the world in which they live. The narcotic argument, by contrast, overlooks the often desperate uncertainty that marks the products peddled by corporate culture lords to a presumably gullible public . . . . But if the study of popular culture is surrounded by a great deal of uncertainty, even mystery, it also affords valuable clues – about collective fears, hopes, and debates.<sup>61</sup>

There are at least two critical points expressed here which challenge the traditional image of popular culture as ideological indoctrination. First, much of the theoretical literature presumes a power and level of proficiency on the part of the purveyors of popular culture that may be both unrealistic and empirically unjustified. One way of reading the relationship between cultural production and consumption is to say that the producers of much of mass culture appear to be guided more by frantic and random attempts to capture some sufficient portion of the *Zeitgeist* than by an adherence to an identifiable ideological code or set of standards.<sup>62</sup> Second, while it seems equally unrealistic to assume that cultural consumers have total power and popular culture simply reflects their tastes and desires and views of the world, acknowledging the power of consumers to reject or reinterpret cultural products is nonetheless an important corrective.

Still other post-Frankfurt School scholars have eschewed both the top-down approach of the Frankfurt School and the bottom-up idealism of later critics, finding instead more negotiation and complexity in the relationship between mass culture texts and the audiences that consume and reproduce them. The Birmingham Centre for Contemporary Cultural Studies initiated and advanced a critical approach to culture that was second only to the Frankfurt School in its innovation and influence. Centered at the University of Birmingham in Britain during from the 1960s into the 1980s, British cultural critics shared with their German predecessors at the Frankfurt School a Marxist concern for ideological representations and reproduction in cultural texts, although their perspective was more directly indebted to Althusser and Gramsci than Marx himself.<sup>63</sup>

However, the Birmingham School also challenged the theoretical model of the

60. JIM CULLEN, *THE ART OF DEMOCRACY* 12 (1996).

61. *Id.*

62. See, e.g., Patrick Goldstein, OAKLAND TRIB., Jan. 18, 2004 (Bay Area Living Section). Goldstein believes that the reason smart and powerful executives running Hollywood studios can make so many critical financial and artistic mistakes is simply "failure of nerve. The mantra of today's big studios is: Avoid risk. It's a fine philosophy if you're an insurance carrier, but if history is any judge, to make great movies you have to take huge risks." *Id.* See also Shaunti Feldhahn, *Media execs know not what they do*, ATLANTA J. CONST., Apr. 7, 2004 at A15.

63. See PATRICK BRANTLINGER, *CRUSOE'S FOOTSTEPS: CULTURAL STUDIES IN BRITAIN AND AMERICA* 68-107 (1990).

Frankfurt School.<sup>64</sup> Stuart Hall, who was director of the Centre for a decade, identified at least three ways in which its work parted company with the Frankfurt School model. The first was a rethinking of ideology that was more aware of discourse, power, consent, and subjectivity.<sup>65</sup> Second, the Birmingham School “challenged the notions of media texts as ‘transparent’ bearers of meaning,”<sup>66</sup> emphasizing the necessity of analysis and interpretation and taking account of contestation over meaning. Third, it “broke with the passive and undifferentiated conceptions of the ‘audience’ as it has largely appeared in traditional research.”<sup>67</sup> These last two related points of departure are noteworthy in their contrast with the Frankfurt School, which tended to see cultural meaning as clear, and as dictated to passive consumers by the culture industry. The Birmingham School allowed for agency among cultural consumers in making and revising the meanings of the cultural products that engaged them. Indeed, British cultural studies initiated audience studies and reception theory as a way of critically investigating the ways in which audiences make sense of cultural texts.<sup>68</sup> But the agency that the Birmingham School brought to the study of culture was not unqualified; its work acknowledged that cultural meanings were constructed both from above and below—what Hall calls encoding and decoding—and hence subject to negotiation and contestation.<sup>69</sup>

Cultural studies in Britain was undeniably influenced by the literary criticism practiced by its founders in that it studied not culture but cultural *texts*; the “linguistic turn” textualized its objects of inquiry by understanding culture, like language, as a signifying system.<sup>70</sup> But this did not lessen the importance of ideology. It was Roland Barthes, in his influential book *Mythologies*,<sup>71</sup> who explicitly read cultural products as texts (food, movie stars, travel guides, wrestling, advertisements for dishes and cleaning products) and read them semiotically for their connotative ideological messages, for the ways in which they tended to naturalize and universalize the values they expressed.<sup>72</sup>

The Birmingham School adopted a notion of ideology that went beyond the Marxist formulation of false consciousness or misrepresentation of material reality for the purpose of legitimating unequal social relations.<sup>73</sup> Following Althusser and

64. Stuart Hall, *Introduction to Media Studies at the Centre*, in *CULTURE, MEDIA, LANGUAGE: WORKING PAPERS IN CULTURAL STUDIES, 1972-79* 117, 117-121 (Stuart Hall et al. eds., 1992).

65. *Id.* at 121.

66. *Id.* at 117.

67. *Id.* at 118.

68. See DAVID MORELY, *THE “NATIONWIDE” AUDIENCE* (1980). See also DOROTHY HOBSON, *CROSSROADS: THE DRAMA OF A SOAP OPERA* (1982); TANIA MODLESKI, *LOVING WITH A VENGEANCE: MASS-PRODUCED FANTASIES FOR WOMEN* (1984); JANICE RADWAY, *READING THE ROMANCE: WOMEN, PATRIARCHY AND POPULAR LITERATURE* (1987); GRAEME TURNER, *BRITISH CULTURAL STUDIES: AN INTRODUCTION* 122-55 (2d ed. 1996).

69. Stuart Hall, *Encoding/Decoding*, in *CULTURE, MEDIA, LANGUAGE*, *supra* note 64, at 128.

70. BRANTLINGER, *supra* note 63, at 77.

71. ROLAND BARTHES, *MYTHOLOGIES* (Annette Lavers trans., 1972).

72. *Id.* at 129 (“We reach here the very principle of myth: it transforms history into nature.”); BRANTLINGER, *supra* note 63, at 78.

73. Although the Frankfurt School went beyond traditional Marxism by making culture into an

post-structuralism, they tended to use ideology to mean the whole conceptual system or set of stories and images through which people make sense of themselves, their lives and the material conditions of their existence.<sup>74</sup> British cultural studies and Althusser were additionally indebted to the thinking of Antonio Gramsci, who added complexity to the discussion of the social and political reproduction of ideology with his theory of "hegemony." By hegemony Gramsci meant the ways in which the institutions of civil society (education, religion, culture) exercise power by inducing consent rather than through outright coercion.<sup>75</sup> This idea is particularly important for illuminating the ways in which mass-mediated popular culture gets its ideological power: it doesn't force people to believe one thing or another, it merely makes certain ways of thinking and acting and being seem utterly normal and natural.<sup>76</sup> Popular culture informs our common sense, and for Gramsci, common sense is a form of ideology; it is "the conception of the world which is uncritically absorbed by the various social and cultural environments in which the moral individuality of the average man is developed."<sup>77</sup>

Another of the innovations of the Birmingham School that is relevant to a contemporary reading of popular culture is their theory of audience and meaning-making, a theory that takes account of the critical ways in which people respond to their cultural environment. Stuart Hall's influential concept of the encoding and decoding of cultural texts is perhaps the best example of this innovation.<sup>78</sup> Hall marries a Marxist theory of production with semiotics to argue that cultural texts don't have a single message that is sent by the culture industries and simply received and absorbed by the consumer. Cultural mass communication is instead a discursive loop in which a text (say a television show or a movie) is "encoded" with a message or set of messages at the point of production, it circulates and is distributed to different populations and locations, and then is consumed.<sup>79</sup> Consumption is the moment of "decoding" when the viewer gives the message meaning, but the consumer will not necessarily take the meaning intended by the

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important and primary object of inquiry, it nonetheless tended to use Marxism's more pejorative formulation of ideology.

74. Louis Althusser, *Ideology and Ideological State Apparatuses (Notes towards an Investigation)*, in *LENIN AND PHILOSOPHY, AND OTHER ESSAYS* 123 (Ben Brewster trans., 1977). This meaning can also be distinguished from the use of ideology to convey the political ideas of a particular economic class (as in "bourgeois ideology"). See *THE COLUMBIA DICTIONARY OF MODERN LITERARY AND CULTURAL CRITICISM* 149-51 (Joseph Childers & Gary Hentzi eds., 1995) (providing four possible formulations of ideology). It should be noted that although Althusser takes into account all the myriad social institutions through which ideology is reproduced, his articulation still has an element of delusion and of the imaginary. Althusser, *supra* note 74, at 152 ("Ideology represents the imaginary relationship of individuals to their real conditions of existence.")

75. ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* 242-46 (Quintin Hoare & Geoffrey Nowell Smith eds & trans., 1971).

76. *Id.* at 242 (noting how civil society "operates without 'sanctions' or compulsory 'obligations,' but nevertheless exerts a collective pressure and obtains objective results in the form of an evolution of customs, ways of thinking and acting, morality, etc.)."

77. *Id.* at 419.

78. Hall, *supra* note 69, at 128.

79. *Id.* at 128-30.

producer; in other words, decoding is a process of translation and interpretation, and the viewer may not interpret the message according to the dominant or preferred reading but in reference to an alternate code.<sup>80</sup> "It is this set of decoded meanings which 'have an effect', influence, entertain, instruct or persuade, with very complex perceptual, cognitive, emotional, ideological or behavioral consequences."<sup>81</sup> Reproduction is the completion of the loop such that audience understandings perpetuate dominant meanings or reinterpret them in ways which might influence future cultural production.

Hall acknowledges that there are limits to the range of meanings consumers find in cultural texts. Indeed, there must be "some degree of reciprocity between encoding and decoding moments, otherwise we could not speak of an effective communicative exchange at all."<sup>82</sup> It is in this way, among others, that agency is constrained and meanings can be said to be negotiated between producers and consumers according to the codes available to them. Hall goes on to identify three hypothetical positions from which pop cultural decodings take place: the dominant-hegemonic position, in which the viewer adopts the same understanding and position as the producer; the negotiated position, from which the consumer accepts the fundamental legitimacy of the dominant viewpoint but nonetheless negotiates various oppositional exceptions; and the oppositional position, in which the viewer understands the message that is intended and decodes it in a decidedly contrary way.<sup>83</sup>

For our purposes, we are interested in the ideological messages of two mass cultural media, television and film, as well as the extent to which the legal products of these media are accessible to alternative readings by viewers, readings which suggest more complex ideological meanings or even resistant themes of law's illegitimacy or moral indeterminacy. However, while the Birmingham School emphasized the importance of actual interpretations by cultural consumers, the potential of reception theory has largely gone unrealized. Because studies of

80. *Id.* at 134-35. According to Hall, signification operates according to various codes. "These codes are the means by which power and ideology are made to signify in particular discourses. They refer signs to the 'maps of meaning' into which any culture is classified; and those 'maps of social reality' have the whole range of social meanings, practices, and usages, power and interest 'written in' to them." *Id.* at 134.

81. *Id.* at 130. It should be noted that when encoded and decoded meanings are different from each other, it is not always the viewer's interpretation which is more subversive. It is not so unusual that radical directors encode messages which are decoded by viewers in very conventional ways. Without using Hall's language, David Ray Papke nonetheless gets at the heart of encoding and decoding in his discussion of Francis Ford Coppola and the *Godfather* films:

In particular, Coppola was determined to challenge the mythic understanding of the United States as a pluralistic society living by a rule of law and serving as a model for the rest of the world. He proffered as a symbol for America the lawless and criminal Corleones . . . . However, Coppola's viewers were themselves not necessarily demythologizers. Many enjoyed and interpreted the *Godfather* films with reference rather than in opposition to American myths.

David Ray Papke, *Myth and meaning: Francis Ford Coppola and Popular Response to the Godfather Trilogy*, in *LEGAL REELISM: MOVIES AS LEGAL TEXTS*, 1-2 (John Denvir ed., 1996).

82. Hall, *supra* note 69, at 136.

83. *Id.* at 136-38.

television and film viewers' decodings of law-related shows are virtually nonexistent, we take this Birmingham School insight as, at minimum, an imperative to allow for multiple readings of any cultural text. Thus we borrow from Barthes an authorial exploration into the legal mythologies that come to us on screen.

### III. WHAT'S SHOWING?

We now turn to the central question of our analysis – given the classical theoretical critique of mass and popular culture and the industries that produce it, what images of law and justice would we expect to see in American popular culture? If the Frankfurt School theorists are correct, mass-mediated popular culture is not popular in the sense that it bears much imprint of popular beliefs and opinions. Rather, the culture industries manufacture mass entertainment which uniformly and effectively communicates a legal ideology that is consistent with the economic and political interests of an elite industry of which they are a part. It is uniform in the sense that cultural producers flood the market with images and messages that support a dominant legal ideology to the exclusion of competing images and messages. It is effective in the sense that consumers understand the images and messages in the way they are intended, and as the Frankfurt School theorists believed, mass culture was so effective precisely because it created a mass public of consumers who adopted wholesale the ideological position of the culture industries and who were thereby reconciled to their own subordination. The spectators and audiences of popular culture were just one more cultural commodity. Even Benjamin, who thought the mediation of the camera opened up critical possibilities, still believed that cultural consumers were rendered critically impotent by the ideological power of cultural producers.

Applying this conception of mass culture to television and film images of the law, one would expect a somewhat crude model of ideological communication and content. Under a crude model, these images of law would provide clear, strong, unambiguous, and ultimately comforting images of law and legal institutions. These images would suggest that law usually gets at the truth and most often promotes justice. We say “usually” and “most often” because even within a crude model of legal ideology, popular culture images of the law can be said to perpetuate a crude ideology of law without every aspect of that portrayal conforming to the model.<sup>84</sup> Ideological structures, like the cultures that produce and are reproduced by them, are not monolithic.

The model does assume, however, that if mass-mediated popular culture is to successfully reinforce the existing power structure, it must foster the belief among consumers that they can trust, rely on and take full advantage of existing legal institutions and that there is no need for any significant alteration to the legal structure. Pursuant to this model, the narratives and images of law in popular

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84. See *infra* notes 89-90 and accompanying text (discussing competing versions of the dominant ideology, one that emphasizes the rule of law and another that emphasizes individualism).

culture should paint a reassuring picture (either real or fictional—it makes no difference from an ideology-reinforcing perspective) about the law's ability to achieve justice, a picture that understands its viewers as content and faithful citizens and avid consumers.

Under the crude model, one might expect images of law that are both deeply formulaic and cathartic. They might, and often do, resemble circumscribed and overly dramatic "highlight" clips, with ready-made, predictable heroes and villains and consistently just resolutions to conflict. According to this model images of law would promote the advertising "environment" of mass media by dampening political doubt and dissent, displacing it instead with status anxiety. The legal images we have in mind here are the stock legal characters and plot lines of popular culture: faithful, honest, working class cops; clever, talented, and fundamentally humane lawyers who ultimately put away the guilty and free the innocent; wronged and powerless individuals who against all odds triumph over faceless, corporate wrongdoers; fair and impartial judges (whose fairness and impartiality is reinforced by the occasional exposure of judicial bias or corruption which is promptly punished, purifying the ranks of judges and rendering the aberrant behavior all the more aberrant); and dedicated, dutiful and sometimes brilliant political leaders, who notwithstanding understandable differences of opinion, all try to do the greatest good for the greatest number of citizens. At its most basic, the images of law and legal institutions that a crude version of legal ideology supports would reassure cultural consumers that existing legal institutions and actors can be counted on to produce something that feels like justice.<sup>85</sup>

The Birmingham School critique, however, suggests that the power of the culture industries is less uniform and effective, mediated as it is by popular reinterpretation and resistance. If it is right, one would expect a good deal more variation in the ideological commitments of producers and in the kinds of images of law that are produced. In addition, British cultural studies allowed room for popular understandings of cultural images and messages that were less aligned with the dominant legal ideology. Thus, in contrast to the Frankfurt School, a Birmingham theorist would expect to see a more varied range of legal images and meanings, generated by both pop cultural producers and consumers. One would expect many of those legal images to be consistent with a dominant legal ideology and some to be ideologically challenging and subversive. By rethinking power as fundamentally discursive and insisting on a role for cultural consumers in the meaning-making process, the Birmingham School necessarily allowed for more variation and inconsistency in the ability of popular culture to reproduce dominant ideological ideas. Ideological reproduction is varied here because cultural producers are only partly responsible for the meanings generated by cultural products.

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85. See *supra* note 18 (discussing the contested and ambivalent nature of justice both within and outside popular culture). When we use the term "justice" in the context of crude ideological reproduction, we are not committed to any particular content for the concept, but in stock popular culture narratives, there is usually a clear sense of what justice entails.

As Birmingham scholars make clear, however, not all critical or ambivalent portrayals of law and legal institutions are inconsistent with a dominant ideology of law. Indeed, there is a venerable tradition of law-bashing that we think is nonetheless consistent with a dominant ideology of law. One reason for this is because ideology itself is not monolithic. For example, one tension that runs through American legal ideology is between respect for law as a social organizer and the ideal of individualism and libertarianism. So some kinds of criticism of law or legal institutions are merely supportive of one version of the dominant ideology (individualism) over another (important constraints imposed on individuals by the law). That said, not all popular critiques of law are ideologically reinforcing. To take the agency and critical capacity of viewers seriously, in the way suggested by the Birmingham School's cultural theory, means allowing for and identifying the ways in which critiques of law tend to support or erode a dominant legal ideology.

A complex version of legal ideology suggests that some critical engagements with law and popular culture are still ideology reinforcing. These critiques might take a number of different forms. For one, pop cultural portrayals might present images that seem more plausible and realistic than the caricatures outlined above but nonetheless dampen critical, political engagement. Or critical presentations of law might be used to show how in tolerating individual dissent and critique the authority of legal institutions is made stronger. Finally, portrayals of law's failures might be ideology-reinforcing if they maintain a sense of moral order that is not eroded by the failing of legal order. Sometimes we can live with law's not tracking morality, as long as we agree about what the right outcome should be and who the good guys and the bad guys are. Portrayals of law's total failure to achieve justice often reflect just this sort of complex version of legal ideology in that they depend implicitly on a shared and self-evident vision of justice (and it is the rarest of popular culture texts that posits an ambivalent sense of the requirements of justice, while any number provide images of law as incapable of producing readily apparent justice). Indeed, in a sense, one version of a dominant reading of law is precisely its ineffectuality, its technicality, its fussiness, and its complexity in the face of a clear moral order.<sup>86</sup> And one thing which makes this dichotomy possible is the presumed common sense about justice that forms the foundation of mass-mediated popular culture.

Jessica Silbey, in her analysis of the ideological posture of trial films, finds what we are calling a complex version of legal ideology. She explains the critical

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86. As Judge Posner has observed:

The frequent discontinuity between the spirit and letter of the law, or between its general aim and its concrete application, is one reason why law so often strikes laymen as arbitrary. And law's apparently arbitrary and undeniably coercive character, combined with the inevitable errors of fact and law in the administration of justice and the resulting miscarriages of justice, and the law's "otherness" (law, like language, the state, and the market economy, is a human institution frequently perceived as external to man, like a natural phenomenon), makes law a superb metaphor for the random, coercive, and "unfair" light in which the human condition—"life"—appears to us in some moods.

RICHARD POSNER, *LAW AND LITERATURE* 21-22 (1998).

position of the viewer-subject in a number of films:

[The viewer-subject] is incorporated into the film's story of law and results in an affirmation of both law's capacity to include those who dissent from it and film's capacity to incorporate its viewers in its worldmaking. The trial film deliberately choreographs the viewer-subject's participation in and critique of law to produce and sustain the ideology of liberal legalism: an understanding that law's recursive structure sustains its authority and power, but also an insistence on the possibility of (as the liberal legal subject claims to embody an example of) individual resistance and agency despite law's engulfing presence.<sup>87</sup>

As Silbey suggests, one reason that individual critique and resistance to law can be ideologically reinforcing is because they support liberalism, one of the first principles of American legal ideology. Silbey's conclusion is that the trial film genre's visual and narrative patterns fit within the ideology of liberal legalism in one of two forms that map onto what we are calling crude and complex legal ideologies: either because law achieves justice, or because even when law fails justice, these films perpetuate "law's reputation as an ever-present social organizer—not because the law is always right, but because it is always the law, the last sanctioned force, the foundation upon which everyone has dared to stand."<sup>88</sup>

Under the complex model, one would expect to see very different images of law and legal institutions than what one would see under a crude model of legal ideology. Here, pop cultural images of law would be more likely to convey "popular" attitudes toward the law, attitudes which reflect the complexity, ambivalence and disdain that people feel about the law. To the extent that the consumers of popular culture find their interactions with the law and legal institutions to be frightening, intimidating, incomprehensible, or alienating, and to the extent that consumers believe or even suspect that legal institutions may not be consistently producing just resolutions to societal disputes, one would expect to see a far more nuanced and ambiguous, and sometimes deeply negative, depiction of law and its relationship to justice in our popular culture.

However, even under the complex model, we argue that many popular cultural portrayals of law will still be consistent with a dominant legal ideology. As this is the case, what one would *not* expect to see are images that portray the legal system as fundamentally fragile, arbitrary, illegitimate, or lacking in authority. Representations of law that question the naturalness or existence of a shared moral order, that suggest that the moral order depends to some extent on the idiosyncrasies of law, or that allow for the possibility of an anarchic rejection of law as we know it would not be ideologically reproducing at all; they would be oppositional and counterhegemonic.

Stuart Hall's theory of encoding and decoding helps illuminate the ways in which law is portrayed in cultural texts and understood by cultural consumers. Certainly any text can be subject to oppositional decoding. Yet in the absence of

87. Jessica Silbey, *Patterns of Courtroom Justice*, 28 J.L. & Soc'y 97, 98 (2001).

88. *Id.* at 112.



authoritative studies of viewers of the shows and films we discuss, we find some texts and some media less heavily encoded and more open to negotiated or oppositional readings. For example, we find that the vast majority of network television is most easily and naturally decoded from the dominant position; that is, viewers probably tend to read the visual and verbal narratives much as the producers intend and in keeping with a rather crude version of ideological reinforcement: there are clear good guys, bad guys, and law usually works pretty well. There are, to be sure, very occasional examples in television of shows that allow for more negotiated or even oppositional readings and where the ideological production is more complex. In contrast, we find more film texts to be less ideologically determinative than much of the content on network television. There are simply a greater percentage of films that allow for negotiated or oppositional readings, readings that find the moral framework more ambiguous, and the legal system more unreliable, more random, more corrupt. Films that allow for these sorts of readings tend to be those which reinforce a more complex version of legal ideology or which subvert the dominant forms of legal ideology altogether.

## A. LAW ON TELEVISION

### 1. A Brief History of Legal Ideology on T.V.

At the outset of our critical readings of television and film texts, it is important to explain how we chose the shows and movies we focus on in the article. Given that this Article is an attempt to provide a more comprehensive account of the ideological content of legal television and film, we focus on those texts that had a significant popular impact, due either to sheer audience numbers or occasionally to breadth of influence. In addition, in the interests of intellectual dialogue, where possible, we chose texts that had been taken up by other legal scholars.

To an overwhelming extent the images of law and legal institutions that have been depicted on television have followed the model that the Frankfurt School scholars would have predicted.<sup>89</sup> A brief but comprehensive survey of the legally themed programs aired on network television during its relatively short history demonstrates the dominance of crude ideology-reinforcing images of the law and legal institutions in the medium.<sup>90</sup> With a few arguable exceptions, the images of law and legal structures depicted on television serve to reinforce the most

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89. "TV's spectacle of superficial contrast did not develop automatically, but has been the achievement of the sponsor, who has worked for over three decades to cleanse the spectacle of cowboys, independent documentaries, too-sober Dads, and other incommensurable elements." MARK CRISPIN MILLER, *BOXED IN: THE CULTURE OF TV* 13 (1988).

90. Our specific reference to network television is both intentional and important to our analysis. The crude ideological model of popular culture fits the dynamics of network television more readily than either popular film or newer television business models such as pay cable and satellite television, which do not rely on advertising revenue to make a profit. As we discuss at length later in the article, it is reliance on advertising as the profit engine that partially accounts for some of the differences in ideological reproduction between film and network television.

reassuring conceptions of the relationship between law and justice and even offer comforting mythologies (attorneys and judges as heroic and capable defenders of justice, the legal system as predictably successful in punishing the culpable and vindicating the innocent and government officials as honest and hard-working public servants with the best interests of their constituents at heart) as alternatives to the more complex and disturbing legal images presented elsewhere, in popular film, in other entertainment media or in the real world.

In 1949, the second year of a full network prime time programming, *Court of Current Issues*, the first overtly legal network show, aired on Tuesdays at 8 p.m. on the DuMont network. Each week, a real judge or attorney sat on a bench while prominent public figures debated important issues of the day in the guise of examining counsel and witnesses. Following the debate, a jury of 12 audience members issued a "verdict."<sup>91</sup> This orderly, issue-driven offering suggests at once both the naïveté of early television producers as to the potential social impact of the powerful new medium, and a stunning pre-figuration of the currently dominant "reality" television motif.<sup>92</sup>

In 1950, the first television law enforcement officials appeared in the legendary guises of *Captain Video*<sup>93</sup> and *Dick Tracy*,<sup>94</sup> followed soon thereafter in the early 50's by a slew of other private detective shows,<sup>95</sup> and urban cop dramas.<sup>96</sup> With the notable exception of *Dragnet*, which aired in some form until 1970<sup>97</sup> (and returned to network television in 2002) these shows were never particularly successful or long-running, but all provided the same basic storylines: just, intelligent, even heroic law enforcement officials quickly solving crime and invariably fostering justice.

One drama that was particularly emblematic of this sub-genre, *Treasury Men In*

91. TIM BROOKS & EARLE MARSH, COMPLETE DIRECTORY OF PRIME TIME NETWORK AND CABLE TV SHOWS, 1946-PRESENT 212-13 (1999).

92. Law and legal issues are particularly enticing subjects for the reality television motif as demonstrated by the existence of Court TV, an entire cable network dedicated to the airing of actual civil and criminal trials, and the influence of Court TV on the news magazine shows of the various networks, including NBC's Dateline, which employed a device during recent seasons where audience members would be asked to vote "guilty or innocent" by phone and email during the course of a story in which the evidence of the guilt of the accused was exposed slowly for heightened dramatic appeal.

93. *Captain Video*, a show whose primary intended audience was children, was "a scientific genius who took it upon himself, as a private citizen, to insure the safety of the universe. Operating from his secret, mountaintop headquarters, sometime in the twenty-first or twenty-second century, he controlled a vast network of Video Rangers as well as an impressive arsenal of futuristic weaponry of his own invention." BROOKS & MARSH, *supra* note 91, at 160.

94. After more than a decade as a popular network radio program, *Dick Tracy* aired for only one season on ABC between 1950 and 1951. *Id.* at 257.

95. These included *Ellery Queen*; *Rocky King, Detective*; *Charlie Wild, Private Detective*; *Inspector Mark Saber*; *Martin Kane and Private Eye*. The "private eye" drama remained a popular staple of network television, through the 50s and 60s (with shows like *M Squad*, *The Thin Man*, *The Naked City*, *Peter Gun*, and *The Untouchable*). *Id.* at 1162-64. The detective genre lasted well into the 1980s.

96. These included *The Plainclothesman*, *Crime Syndicated*, *The Man Behind the Badge* and *Dragnet*, which premiered in 1952. *Id.* at 1154-59.

97. *Id.* at 282.

*Action*, which aired from 1950 to 1955, was based on actual cases from the files of the United States Treasury Department, with real government officials even appearing in various episodes. Each hour-long episode concluded with successful government agents prevailing over their criminal counterparts, and the show garnered various awards from government officials as "public service" programming.<sup>98</sup> This show was characteristic both in its basic perspective on the law enforcement community, which was unwaveringly laudatory, and in the fact that these heroic government officials never failed in their duty and justice always resulted.

The first network show to feature attorneys (as opposed to law enforcement officials) as central characters was the short-lived *Justice*, which was aired in the timeslot before *Dragnet* on NBC from 1954 to 1956. The stories centered on National Legal Aid Society representation of indigent criminal and civil clients.<sup>99</sup> But the first truly significant popular culture depiction of an attorney on television came the next year, on September 21, 1957 when CBS first aired *Perry Mason*. The show, based on the characters in Erle Stanley Gardner's novels, focused on the practice of the eponymous criminal defense attorney and was the most successful legal drama, and one of the most popular shows of any kind, in network television history.<sup>100</sup> It had such a strong popular cultural influence that millions of people born after its last episode aired are still familiar both with the character and with his signature talent for dramatic and successful cross-examination.<sup>101</sup>

Decades after the series aired, one might be surprised to learn the extent of the defense attorney's now legendary skill for extracting the truth in open court. Mason was not depicted merely as a successful or even remarkably successful lawyer during the course of the series. He was *perfect*. Each episode of the series culminated in a court hearing with "the guilty party taking the witness stand, only to break down in a dramatic confession under Mason's battering cross-examination."<sup>102</sup>

Mason won every case in this dramatic manner (which highlighted his great skill, determination, and commitment to justice for his client) with the purely technical exception of one client who was initially convicted after she refused to reveal evidence that would have exonerated her, only to have Mason find the real

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98. *Id.* at 1051.

99. *Id.* at 529.

100. ALEXANDER M. MCNEIL, *TOTALLY TELEVISION* 651 (4th ed. 1996) ("Though the character was featured in dozens of novels, several films, a radio serial that ran for twelve years, and two television series, Raymond Burr's portrayal of the Los Angeles lawyer in the nine-year run of the first Perry Mason TV series overshadows all the others.").

101. See Christine Alice Corcos, *Legal Fictions: Irony, Storytelling, Truth and Justice in the Modern Courtroom Drama*, 25 U. ARK. LITTLE ROCK L. REV. 503, 512 n. 42 (2003) ("That Perry Mason retains his attraction for lawyers and nonlawyers alike and that the character influenced many future lawyers seems clear.").

102. "'But' if you were at home on the night of the murder, Mr. Jones, then how could you have know that . . ." To which the shell-shocked culprit could only sob, "I didn't mean to kill her." BROOKS & MARSH, *supra* note 91, at 798. Rather than a jury trial, the cross examinations took place during preliminary hearings, which under California procedure are quite extensive. We thank Mike Seidman for this correction of popular accounts.

culprit and prove her innocence by in the end of the episode.<sup>103</sup> Even this minor twist on the formula—an exception which seems all but mandatory if only to provide some semblance of suspense for series viewers—served to reinforce, if not accentuate, Mason's heroic character. He could be, and in fact would *always be*, successful at producing a just result even if his own client refused to help him. He could, indeed, transcend the petty concerns of his actual clients in order to serve the broader societal need for a just and effective legal system. And any concern which might arise from the perfect failure rate of the prosecution in these cases was allayed by the fact that all of the clients Mason worked to acquit were innocent.

*Perry Mason* aired on CBS for ten seasons, longer than any other show that featured attorneys, and longer than any other legally themed show with the exception of two westerns, *Gunsmoke* (twenty seasons) and *Bonanza* (fourteen seasons), and two police dramas *Dragnet* (twelve seasons) and *Columbo* (tied at ten seasons).<sup>104</sup> The show fit the crude model of an ideology-reinforcing image of lawyers and the legal system neatly. The innocent were never convicted, and the guilty were always exposed in the end, and these just results were produced by officers of the court working within the boundaries of the system. The unflagging consistency of this kind of system-procured justice fostered both a kind of hero worship of the attorney and an abiding faith that the justice system could be expected (even relied upon) to produce a just result. However, alternative readings of even such a legal standard-bearer are possible. One is that with a foolish prosecutor and a misguided homicide detective, those clients who did not have the good fortune of having Mason as their lawyer were at the mercy of other unreliable law-enforcement figures. Another possibility is that suggested by Norman Rosenberg: with a classic show that endures in syndication one is likely to see younger viewers reading the show "with very different sensibilities and through equally different ideological frameworks from older fans of the show."<sup>105</sup> Rosenberg suggests, for example, that younger viewers read *Perry Mason* as legal camp.<sup>106</sup>

*Perry Mason* was the only successful network series during this period with a lawyer as a central character. Less popular but worth noting was CBS' *The Defenders*, which aired in 1961 and was the second major network show that focused primarily on the work of lawyers. Critically acclaimed (it received thirteen Emmys in its short run, including Outstanding Dramatic Series), and initially placed in the time slot after *Perry Mason*, the series focused on a father-son law firm and addressed much more controversial and topical issues than those raised on *Perry Mason* or on virtually any other network show for that matter.<sup>107</sup> Despite its critical acclaim, the more innovative and demanding subject matter never garnered

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103. BROOKS & MARSH, *supra* note 91, at 798.

104. *Id.* at 1260-61.

105. Norman Rosenberg, *Perry Mason*, in *PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE* 115, 116 (Robert M. Jarvis & Paul R. Joseph eds., 1998).

106. *Id.*

107. According to David Papke, the show also decidedly endorsed liberal legalism. David Ray Papke, *The Defenders*, in *PRIME TIME LAW*, *supra* note 105, at 3, 3-15.

a large audience. While *Perry Mason* was a top twenty-five show from 1958 to 1964, averaging a viewership of 25.4%, *The Defenders* never cracked the top thirty or a viewership percentage in the twenties, and it was removed from the network schedule after three years.<sup>108</sup>

With the exception of the various cop and crime shows which continued to appear,<sup>109</sup> the next significant legally themed show was *The Fugitive*, the ongoing saga of a man falsely accused (and doggedly pursued by law enforcement officials) for the murder of his wife.<sup>110</sup> Although only airing for four seasons, it was a remarkably popular series (peaking as the fifth rated prime time network show for the 1965 season) and had an uncommonly powerful impact on the popular culture as demonstrated by the response to its August 29, 1967 final episode which garnered more viewers than any other television show up to that time. Its seventy-two percent share of the television-viewing audience was not matched by a network television show again for thirteen years.<sup>111</sup>

Albeit in a slightly more subtle way than that heavy-handed and predictable *Perry Mason*, *The Fugitive* provided a similarly effective ideological image of the law, law enforcement and their relationship with justice. While it took four years, the ultimate resolution of the dramatic conflict in *The Fugitive* served to reinforce the faith and confidence in the nation's legal system and in its ability to produce just results. In the final episode, the falsely accused main character, Richard Kimble, finally corners the true killer, and, Phillip Gerard, the law enforcement official who has been pursuing Kimble during the series, finally realizes the truth, interjecting himself in a climactic confrontation between Kimble and the real killer, shooting and killing the latter. So, while justice was tantalizingly delayed, it was nonetheless ultimately achieved and, perhaps most importantly, by the symbol of the legal system himself. Kimble's vigilantism was subdued and law's power regained. Although all the legal professionals involved, from lawyers to judges to police officers, stood ready to facilitate the execution of an innocent man, in the end it was the guilty who received just and somewhat swift punishment.

The dominant ideological message of *The Fugitive* is heavily encoded: even when all the evidence points to an innocent person, we should not fear the law because it prevails in the end. It does not just prevail because it is the law, it prevails because it is fundamentally just. There is, however, an alternative reading of *The Fugitive* which is more disturbing and more complex. That message is that if it weren't in fact for Kimble's vigilantism, the legal system would have put an innocent man to death. There is a strong suggestion in *The Fugitive* that law cannot get it right alone, but that suggestion lies mostly dormant in the television show, though it is certainly there for the decoding. Indeed, it may be a reading that has become more pronounced over time, as the series is remembered more for the flight

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108. *Id.* at 1246-49.

109. *E.g.*, *The Man from U.N.C.L.E.* (NBC television broadcast, 1964-1968); *Get Smart!* (NBC television broadcast, 1965-1969).

110. *The Fugitive* (ABC television broadcast, 1963-1967).

111. BROOKS & MARSH, *supra* note 91, at 441.

of the innocent than the capture of the guilty. Interestingly, in a recent film adaptation of the series it is Kimble himself who kills the "one-armed man" while Officer Gerard looks on somewhat helplessly – a substitution which provides a much less comforting picture of law enforcement and less clearly supports the crude version of ideology-reinforcing images of law.<sup>112</sup>

The remainder of the 1960's network schedule saw still more "cop" shows,<sup>113</sup> but in 1970 and 1971 the first shows since *Perry Mason* and *The Defenders* with lawyers as main characters appeared. The three shows, *Storefront Lawyers*, *The Young Lawyers* and *The D.A.*, were all canceled after one season.<sup>114</sup> *The Young Lawyers* and *Storefront Lawyers* were structurally similar to the short-lived mid-50's series *Justice*, focusing on either law students or young lawyers working for neighborhood legal services and representing indigent clients.<sup>115</sup> Interestingly, some of the inherent weaknesses that this format created for prime time marketing were suggested by changes made during the first season of the *Storefront Lawyers* series, which had the main characters returning, but this time to a high-profile private law firm (instead of their more seedy, actual "store-front" digs), and working on cases for more affluent clients, and spending more on camera time in the courtroom.<sup>116</sup> Although these changes did not save the ill-fated series, they did provide a preview of the kinds of legal dramas that would begin to dominate prime time a decade later.

Perhaps as a result of the remarkable lack of success of most of these lawyer dramas, it was fifteen years before a series focusing on lawyers as main characters premiered on one of the major networks.<sup>117</sup> But in 1986, during a period when network programming was dominated by situation comedies, nighttime soap operas

112. THE FUGITIVE (Warner Brothers 1993).

113. E.g., *The FBI* (ABC television broadcast, 1965-1974); *Ironside* (NBC television broadcast, 1967-1975); *N.Y.P.D.* (ABC television broadcast, 1967-1969); *Mission Impossible* (CBS television broadcast, 1966-1973); *Hondo* (ABC television broadcast, 1967); *The Avengers* (ABC television broadcast, 1961-1969); *Adam-12* (NBC television broadcast, 1968-1975); *Mannix* (CBS television broadcast, 1967-1975); *The Mod Squad* (ABC television broadcast, 1968-1973).

114. *Storefront Lawyers* (CBS television broadcast, 1970-1971); *The Young Lawyers* (ABC television broadcast, 1970-1971); *The D.A.* (NBC television broadcast, 1971-1972).

115. BROOKS & MARSH, *supra* note 91, at 1135, 1340. Another show that debuted in 1971 enjoyed slightly more success. *Owen Marshall, Counselor at Law* (ABC), which was co-created by a law professor named Jerry McNeely, focused on the life of a kindly and heroic defense attorney whose compassion for his clients was his most salient trait. Referred to by at least one group of critics as "the courtroom equivalent" of the *Marcus Welby, M.D.* medical drama (ABC), the show lasted until 1974. *Id.* at 899-900.

116. *Id.* at 1135.

117. Two notable exceptions to this network lawyer draught were the ABC television series *Hardcastle and McCormick*, which debuted in 1983 and lasted three years, and the NBC comedy *Night Court*, which first appeared in 1984 and ran until 1992. The remarkable "lawyer" in the former was actually a retired judge who dedicated his life to tracking down "presumed criminals who had beaten the rap in his courtroom over the previous 30 years thanks to smart lawyers, lack of evidence, and other 'legal loopholes.'" *Id.* at 507. *Night Court*, which was set in the chambers and courtroom of a New York City judge who heard minor criminal cases after normal working hours, had the distinction of being the only network television comedy with a consistent legal theme, at least until the debuts of *Ally McBeal* (Fox) and *Ed* (NBC), both arguably primarily comedic.

and a stunning array of private investigator series, a seismic shift occurred when Stephen Bochco, fresh off the remarkable critical and commercial success of *Hill Street Blues*,<sup>118</sup> created the first show in almost two decades centered on a group of lawyers in a legal practice. Unlike the legal dramas of a generation before, which had primarily told the stories of lawyers fighting for the rights of the indigent and alienated, Bochco's new show, *LA Law*,<sup>119</sup> was set in a high profile private firm in Los Angeles that catered to the rich and powerful. And with the possible exceptions of its predecessor *Perry Mason*, and its successor *Ally McBeal*, *LA Law* had a deeper and broader impact on popular culture than any other legally themed show in the history of network television.

*LA Law*, which aired on NBC's powerful Thursday night schedule from 1986 to 1994, provided a significantly different image of both lawyers and the legal system than had *Perry Mason* or *The Fugitive*, but it nonetheless provided an effective vehicle for communication of a crude, ideology-reinforcing image of lawyers and their role in the legal system. The show fit its historical moment—the economic boom times of the mid 1980's—and provided the kind of heroic figures one would expect in that context. The lawyers in the show's central law firm, McKenzie, Brackman, were not admirable because of their legal talents, as *Perry Mason* had been, or even because of their moral or personal attributes. Their stature came from features that were highly regarded at the time: wealth, influence and physical beauty. Each episode began with a shot of a Mercedes trunk, its vanity license plate (which read "LA LAW") filling the screen as the trunk slammed shut. Indeed, the entire show centered on those aspects of the lives of lawyers that allowed them to purchase these sorts of cars and to live the lives of the energetic and privileged.

While some of the lawyers on the series acted in morally questionable ways, perhaps most notably the venal divorce lawyer Arnie Becker, their appeal was based on different sorts of attributes. For example, some of Becker's charm was work-related, such as his dogged pursuit of the best possible legal results for his clients, and some, like his hopeless but harmless promiscuity, was not. But while the reasons the audience had to look up to the main legal characters on TV had changed in the years since *Perry Mason*, the attorneys on *LA Law* were nonetheless heroic figures. To its credit, the series represented law practice in a new way, by making the actual legal issues both central and engaging.<sup>120</sup> However, the primary subject of the show's ideology reinforcement was the legitimization and glorification of the lifestyles and social status of young professionals. Both messages were very successfully communicated given the show's apparent inspiration for a portion of a generation to pursue the legal profession. As Michael Asimow has observed, "L.A. Law sent a message to viewers that you could make a lot of money and have a wonderful life-style while working as a team on fascinating legal problems and doing lots of good along the way. This benign view

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118. *Hill Street Blues* (NBC television broadcast, 1981-1987).

119. *LA Law* (NBC television broadcast, 1986-1994).

120. Stephen Gillers, *Taking L.A. Law More Seriously*, 98 YALE L.J. 1607 (1989).

of law firms and law practice undoubtedly attracted many young people to law school.”<sup>121</sup> Indeed, many others have credited the high profile success of the show, and its particular depiction of the private law firm practice, with an upsurge in applications to law school during its run.<sup>122</sup>

## 2. What's On?

Recent and current network television schedules have fewer series dramas than at any time in the past few decades. But of the remaining dramatic series that have survived the current wave of reality, game and news magazine shows, an overwhelming percentage have law or law enforcement subject matter.<sup>123</sup>

### a. *The West Wing*, *Law & Order*, *The Practice* and *Grit*

The dominant readings of most contemporary legally themed network shows suggest they fit quite neatly into the crude model of ideology-reinforcing images of the relationship between law and legal institutions and justice. They tend to appear more realistic than their predecessors, but this is primarily because the visual cues don't line up with the more conventional narratives. For the most part they use grittiness, low lighting, hand-held camera work, staccato editing and other familiar techniques as visual substitutes for narrative realism. What they do offer are a greater range and depth of characters, but these characters almost always do their best within a legal system that works.

*The West Wing*, a critically and commercially successful dramatic series about a current day, fictional, Democratic White House, provides viewers with reassuring and inspirational images of government and government officials.<sup>124</sup> The show

121. Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1359 (2001) (internal citation omitted).

122. See Arthur Austin, *The Post Modern Buzz in Law School Rankings*, 27 VT. L. REV. 49, 57 (2002) (“During the L.A. Law era—which shaped the popular culture of law—law schools dominated graduate school recruiting, prompting the President of Harvard to complain of a wasteful ‘brain drain’ and ‘a massive diversion of exceptional talent’ into legal education.” (internal citation omitted)). See also State Bar of Wisconsin, *Marquette University Law School*, WIS. LAW., June 2001, at 12, 58 (“Marquette has roughly 1,000 applications for the fall 2001 entering class, or about 24 percent more than the previous academic year. This still falls below the 1,400 applications per year in the early 1990s – a time when many observers attribute the high interest in law school at least in part to the ‘L.A. Law’ syndrome.”); Diane M. Glass, *Portia in Primetime: Women Lawyers, Television, and L.A. Law*, 2 YALE J.L. & FEM. 371, 407 (1990) (suggesting that “the 16% rise in the number of law school applicants in 1987-88 could be attributed to *L.A. Law*’s depiction of a legal career as appealing and lucrative.”).

123. Indeed, it is much easier to list those dramatic series (during the fall 2002 season) from the four major networks that didn't focus on lawyers and/or law enforcement officials—*Boston Public* (Fox); *ER* (NBC); *Touched by an Angel* (CBS); and *American Dreams* (NBC)—than those that did. The remaining hour-long shows aired by NBC, ABC, CBS and Fox all featured government officials, lawyers and/or police officers as major characters: *Law & Order* (NBC); *Law & Order: Special Victims Unit* (NBC); *Law & Order: Criminal Intent* (NBC); *Judging Amy* (CBS); *The Guardian* (CBS); *NYPD Blue* (ABC); *Third Watch* (NBC); *CSI: Crime Scene Investigation* (CBS); *CSI: Miami* (CBS); *The West Wing* (NBC); *Alias* (ABC); *The Practice* (ABC); *The District* (CBS); *Ed* (NBC); *Boomtown* (NBC); *JAG* (CBS); and *Monk* (USA).

124. *The West Wing* (NBC television broadcast, 1999-current).



focuses on a brilliant, noble, and at times heroic president, surrounded by a devoted staff who, while politically motivated, works to serve the president because of their belief that he is the best thing for the country. Even for those viewers who do not share the notably moderate-to-left lean of the depicted administration, the show reinforces the message that our leaders place the interest of the nation above their personal or political agendas. In one extended plot arc during the 2001 season, the President told his staff to offer a job to a young, attractive, aggressive and articulate conservative, presumably for more reasons than her appearance. After offering the young attorney the job, the Chief of Staff responds to her shock by telling her, "The President likes smart people that disagree with him. He wants to hear from you. The President is asking you to serve. And everything else is crap."<sup>125</sup>

After spending a day at the White House where she mainly chastised the staff for their arrogance and detachment, the Republican is still trying to decide whether to take the job when she goes to dinner with some friends from her former job. Her friends take the opportunity to attack the President and White House ("I *hate* those people" one says), asking her if she "met anyone who isn't worthless."<sup>126</sup> Her response is quick and venomous:

Don't say that. I said, don't say that. Say they're smug and superior. Say their approach to public policy makes you want to tear your hair out. Say they like high taxes and spending your money. Say they want to take your guns and open your borders. But don't call them worthless. At least don't do it in front of me. The people that I have met have been extraordinarily qualified, their intent is good, their commitment is true, they are righteous and they are patriots. And I'm their lawyer.<sup>127</sup>

As she storms away from her dumbfounded friends we know her decision, and as members of the audience, no matter what our political leaning, we are implicitly asked to share her courageous ability to rise above partisan animosity to commit to serving her country. The episode is certainly open to a more partisan, propagandistic reading, one which suggests that Republicans are the main source of partisan acrimony and that the country would be better off if more of them did as she does because, whatever their faults, Democrats love their country and work with integrity to make it better. But given the righteous tenor and context of the episode, we think the more dominant message is that our country would be stronger if we could all rise above party pettiness. Indeed, we are left with the impression that, notwithstanding what we might encounter on a daily basis, such non-partisan and patriotic commitment can be found throughout our governmental institutions and its servants regardless of party affiliation.

In its second and third seasons, *The West Wing*, in its hyper-realistic style (achieved with impressively accurate sets, location shots around Washington, D.C., low lighting and cameos from prominent media and government figures), provided its audience with a situation starkly similar to that experienced by President Clinton

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125. *The West Wing: In This White House* (NBC television broadcast, Oct. 25, 2000).

126. *Id.*

127. *Id.*

just a few years before.<sup>128</sup> Fictional President Bartlett is presented with the real possibility of impeachment as a result of a legally sanctionable lie—not the denial of an affair in a civil deposition, but the omission of relevant medical information (his own MS) in a signed and sworn document. Just as his battle to stave off both impeachment and the political devastating compromise of censure reaches its dramatic crescendo, the President steps away from the brink and, placing the interests of both his country and truth itself over his own political interest, admits what he has done and accepts the bitter medicine of public censure.<sup>129</sup>

The show thus provides the audience with a kind of mythic retelling of the Clinton nightmare as well as a fictionalized catharsis in which the show's President does what the real one should have done—acknowledge his mistakes and accept the consequences. For the shows producers, who are clearly sympathetic to the real, former president's political agenda, the point is to show how things could have been different if someone more virtuous, less selfish and more truly civic minded (but with similar talents and policy objectives) had inhabited the White House. And the mythic quality of the story only grows as the show's President overcomes the immediate political consequences of his acknowledgement of wrongdoing (which are presented as severe, at first, if only to enhance the heroic nature of his voluntary admission) and comes from far behind in the polls to trounce what had seemed to be an unbeatable opponent in the next election. On the one hand this is both a very critical narrative and a distinctly partisan rehabilitation story if it is read alongside real political events. But within the world of the show, the narrative gives us exactly the kind of positive image of our leaders that is particularly effective for the communication of a crudely ideological view of government. Moreover, by providing story lines that so closely resemble recent public events, the show provides direct mythic counterpoints to the disturbing realities of recent public life. The point is not that such images can erase the impact of the real events or the audience's consciousness of them, but merely that the substantive content of the series plays the exact ideological role that the Frankfurt School expected from popular culture texts in spite of their stark contrast of reality.

Another current legally themed network series, the ubiquitous *Law & Order* franchise, which saw its fourth iteration in the form of *Crime and Punishment* (a kind of reality twist on its tried and true investigation/prosecution format) during the summer of 2003, provides a similarly mythologized picture of our criminal justice system.<sup>130</sup> While the main characters of the series are far from the impeccable pillars of virtue that Perry Mason was (the main character, an assistant D.A. played by Sam Waterston, has battled his own alcoholism and inappropriate desires for his co-workers over the course of the series), the show nonetheless projects a reliable and predictable message that law and legal institutions are essentially effective at attaining justice and that legal professionals are dedicated to

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128. See, e.g., *The West Wing: Bad Moon Rising* (NBC television broadcast, Apr. 25, 2001).

129. This plotline runs over many episodes. See NBC, *Episode Guide: The West Wing*, at <http://www.nbc.com/The West Wing> (last visited Jan. 2 2005).

130. *Law & Order: Crime & Punishment* (NBC television broadcast, 2002-current).

achieving just ends. The flawed human characters, gritty street scenes, multiracial cast and the dark shots (for some reason the prosecutors' offices have an inadequate supply of lamps) give the visual impression of a realism that is mostly belied by the plots.

The original *Law & Order* series employed a somewhat stiff narrative structure, using the first half hour to focus on the police investigation of that week's crime and the second half of each episode to show the lawyers preparing for trial and arguing their case. Though lauded for its "moral ambiguity",<sup>131</sup> *Law & Order* uses morally fallible characters and morally interesting storylines to give an impression of more moral complexity than it actually delivers. The speed and efficiency with which the crimes are investigated is dazzling, and the formula of the presentation is transparent. We and the police are invariably given one brief red herring (as when, in one recent episode, the police momentarily think that a defense attorney who defended a cop killer may have been murdered by the dead cop's former partner),<sup>132</sup> but literally in a matter of a few minutes of screen time (and not much more within the fictional world), the police get back on track and identify what we in the audience are credibly led to believe is absolutely the real killer (in the example alluded to, an anonymous white-supremacist fanatic is found, in what appears to be less than one day, through a long and implausible string of connections, coincidences and lucky breaks). The prosecutors then take the stage and battle the cynical and obstructionist defense attorneys in an attempt to do justice in the form of prosecution or plea bargain. While politics or prejudice may often influence the specific decisions of the prosecutors, that influence is almost always eventually acknowledged, either personally or by a close colleague, if only to provide the attorneys with the opportunity to triumph over their own personal flaws, doing justice despite themselves and reinforcing a faith in the system which ensures justice even when the individuals involved are weak and human.

The prosecutions in the *Law & Order* series do not result in the conviction of the guilty quite as reliably as the innocent were acquitted in *Perry Mason*, but prosecutions of anyone of ambiguous guilt are all but non-existent, acquittals are rare, and when they do happen, they come with an explanation. In this way the show placates viewers by differentiating between specific, explainable problems that occasionally influence the outcome of a case and a more general and serious suggestion that our legal system is fundamentally arbitrary or corrupt. The first type of the problem is the bread-and-butter of the modern gritty crime drama. The second sort is almost nonexistent on network television.

The other two *Law & Order* series, *Criminal Intent* and *Special Victims Unit*, have pushed the lawyers to the side, primarily in the interest of a slightly longer and more suspenseful criminal investigation. Both shows, much like *NYPD Blue* and the two *CSI (Crime Scene Investigation)* series, which also focus on the

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131. Dawn Keetley, *Law & Order*, in PRIME TIME LAW, *supra* note 105, at 33, 33 (arguing that while *Law & Order* complicates the idea of what constitutes a crime and criminal responsibility, it nonetheless always privileges justice over legal technicalities).

132. *Law & Order: Open Season* (NBC Television Broadcast, Nov. 20, 2002).

criminal investigations of police detectives and forensic scientists, depict the police and other law enforcement officials as brave and heroic figures with pure motives of seeking to identify and punish the guilty and who are rarely unsuccessful in their pursuit of justice. The prevalence of physical and mental intimidation and deception to induce confessions, which each show features in abundance, is portrayed as essentially heroic, as important ways to force or trick the guilty into incriminating themselves when it seems as if they might otherwise get away with the crime. The very questionable tactics the police use to extract confessions are palatable because viewers are rarely confused about a defendant's guilt or an investigator's motives. In most of these shows, the ends insidiously justify the means.

*Criminal Intent* focuses almost exclusively on one detective, played with deliciously quirky zeal by Vincent D'Onofrio, who is a kind of Perry Mason of police detectives. Each episode shows him identifying the killer (again, often in instances where it seems that the guilty party has successfully concealed their guilt), cornering them (usually in the now-familiar two-way-mirrored police interrogation room) and, through the power of superior will, intellect and capacity for deception, forcing the guilty to implicate himself in a murder for which there was little admissible evidence that could have been presented to a jury (other than the miraculous and complete confession). Indeed, we rarely if ever see the inside of a courtroom in this series. It would be unnecessary and redundant after the heroism of the detective has ensured the just outcome to see the anti-climatic acceptance of the inevitable by the jury or judge.

Even network shows that involve less conventional "law and order" premises usually serve to clearly reinforce a dominant ideological image of law. Very few of them do not conform to the crude model. One possible exception may be *The Practice*,<sup>133</sup> a recently-cancelled show produced by David E. Kelly, a former attorney and veteran of the *LA Law* creative team, who has become one of the most successful television producers of his generation. The series focused on a group of attorneys who represented both criminal defendants and civil plaintiffs suing large corporations. On the surface, the very premise invited more opportunities to portray storylines and images that were more nuanced than the crude ideological images of law and law enforcement that dominate network television. And to a certain, limited extent that promise was realized. Unlike Perry Mason before them, these defense attorneys actually represented clients who they either knew or strongly suspected were guilty, and these guilty clients were regularly acquitted by juries. The show also depicted some judges and prosecutors as overly zealous, if not openly corrupt or prejudiced, in the pursuit of convictions. In these important ways, the show clearly diverged from the crudest model in which lawyers are heroes and the legal system is an effective mechanism for producing justice.

Yet a more conventional reading is equally evident in *The Practice* because the thematic core of the show undermines the ideologically challenging aspects. While the attorneys in the firm are often obliged to represent guilty and highly

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133. *The Practice* (ABC television broadcast, 1997-2004).

objectionable clients, they almost never do so willingly or as a matter of course. Each time they take on a new and almost certainly guilty client the attorneys sit in their dark offices and engage in moral hand-wringing and emotional anguish. Rather than approach their jobs, as so many real criminal defense attorneys do, with perspective, humor, and a deep commitment to upholding the presumption of innocence, these attorneys reflect the dominant and popular conviction that criminal defense is fundamentally unsavory and morally repugnant work. In the case of three of the main characters on *The Practice*, Bobby, Lindsay and Eugene, this conviction resulted either in their giving up the practice of criminal defense altogether (in the case of the first two) or in repeatedly threatening to give it up, and switch to prosecution (in the case of Eugene). Eugene, moreover, was often confronted by his ex-wife who repeatedly claimed that his work as a criminal defense attorney was setting a bad example for their son, an African-American boy who was often depicted as being tantalizing close to falling in with the kinds of bad elements that his father made a living defending.

Of course, it wouldn't be much of a law show if all the lawyers quit their jobs, so we are presented with, again to the point of almost rote repetition, the justifications they give for doing what they do. In closing argument after closing argument, over drinks with bewildered prosecuting attorneys, and even to a Catholic priest in confession, the lawyers on *The Practice* tell themselves, the audience, and anyone who will listen that they defend these guilty people not because they want to—the suggestion being that no self-respecting person could ever *want* to—but because they have to, because the legal system requires someone to do so, because the legal system would not work if someone did not courageously step up to take on this unpleasant task so that in the rare instance when an actual innocent person is wrongly accused, there will be mechanisms in place to protect them and produce a just result. The odd result is that the show both depreciates criminal defense and then exaggerates the heroism of those sturdy few who can stomach the job.

Both because of and in spite of the ambivalence the show has towards its own lawyers, the heroism of the attorneys on *The Practice* is more sophisticated than the conventional lawyer-as-hero of the previous generation. For Perry Mason, heroism arose almost purely out of his unimaginable skill and success. But the attorneys of *The Practice* earn their status from their courage and commitment, from their willingness to take on a hard, unpopular, and morally distasteful job and do it to the best of their abilities. This is more reminiscent of Atticus Finch in the novel and film *To Kill a Mockingbird*, whose heroism arises as much from his willingness to bear the burden of defending a black man accused of raping a white woman as it does from his laudable commitment to justice notwithstanding race.<sup>134</sup> The heroism of the attorneys on *The Practice*, as well as the moral murkiness of their jobs, was only enhanced as the main characters increasingly became targeted by their own clients. During the last two seasons, one of the male attorneys was

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134. HARPER LEE, *TO KILL A MOCKINGBIRD* (1st Perennial classics ed., Perennial Classics 2002) (1960); *TO KILL A MOCKINGBIRD* (Universal International Pictures 1962).

severely beaten by a client in a holding cell and many of the female attorneys were stalked or attacked by people that they had represented. One of the attorneys almost died when a bomb sent by a former client exploded in the office. The physical danger makes their clients seem all the less human at the same time that it enhances the lawyers' bravery; the courage of their convictions includes a willingness to risk their lives for the integrity of the justice system.

For all its faults, *The Practice* portrayed an area of legal practice that was otherwise nonexistent on television and it tried to present many of the ethical questions that defense attorneys regularly face in their work. By critiquing law practice (albeit an area of practice that is much maligned by both the government and the general population) and occasionally portraying law's failures, *The Practice* gave a slightly more complex picture of law than its peer shows. But the complex version of legal ideology still fundamentally reproduces dominant ideological themes, and that is especially true here. While the audience may well have been momentarily frustrated at the isolated instances of injustice that were depicted, they were reminded in almost every episode, and repeatedly throughout the course of the series, that their focus should be on the big picture, on the effectiveness of the system as a whole. In this way, the show allowed an audience that could be disturbed by ethically questionable behavior in the criminal justice system (real or fictional) to maintain its faith in the legal system and the moral order generally. It demonized criminal defendants so that we always knew who the bad guys were, we knew who the good guys were, and our discomfort with the existence of the morally ambiguous criminal defense attorney was assuaged by her important role in the criminal justice system, which for all its imperfections, is mostly effective, just, and superior to the imaginable alternatives.

b. *Ally McBeal*, *The Simpsons* and *Humor*

Another possible counter-example to the consistent ideology-reinforcement of legally themed shows on television is the possibility and palatability of critique in humor. While very different in approach, the two network shows that most often approached legal themes through comedy also offered more varied images of law and lawyers, and sometimes they even suggested scathing critique.<sup>135</sup> The wildly popular and critically controversial *Ally McBeal* was one of the very few comedies on television with lawyers as main characters. *The Simpsons*, while not a show whose central theme is law, regularly offers some of the most humorous and devastating depictions of lawyers and the legal system on television.<sup>136</sup>

*Ally McBeal*, yet another David E. Kelley show, premiered in 1997 and ran for five seasons on Fox. Much like the upstart network itself, *Ally McBeal* was a different kind of law show; it was "quirky," in all that the word conveys: amusing, odd and fundamentally bland. While the show did not seem primarily concerned with legal or social critique, the comedic form and its own self-consciousness

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135. See *Reno 911!* (Comedy Central television broadcast, 2003-current).

136. *The Simpsons* (Fox television broadcast, 1989-current).

allowed for a greater range of interpretive possibilities than most television shows about law. It may well be that the show was primarily understood by its viewers much as *L.A. Law* was—as an attractive world of young, wealthy professionals but one updated to appeal to those inclined toward anxiety, irony and ennui. This would be the conventional and ideologically crude interpretation. However, in its parodies of legal cases and courtroom performances, one could also read in *Ally McBeal* a larger critique of law: that it was as flawed, as human and as subject to social prejudice and psychic chaos as the lawyers that practiced it. It is plausible to decode *Ally McBeal* to suggest that law is not about justice, but about the performance of inner and outer controversies, the articulation of psychological and social trauma.

Visually the viewer inhabits both the realities and the fantasies of the characters. The camera often shows what the characters only imagine, fear or desire. Whether hallucinations of Barry White or a dancing baby, many of these visual images of inner anxiety became late 1990s cultural icons. In addition, the lawsuits were exaggerated and absurd, and it rarely mattered whether the lawyers won or lost their cases because they were about the performance of certain ideas. The ultimate courtroom performer, John Cage, one of the two named partners of the firm and a reputedly brilliant lawyer, is a tormented man known for his nose-whistling and shuffling as distraction techniques in the courtroom. And it is John, after losing a case in which he represented a collection of social outcasts fired from a design firm for being too weird, who says that there is triumph in the battle itself.<sup>137</sup>

In so many of the cases portrayed on the show, the law is either the site of farce—as when Ally goes to court with her fingers stuck in a bowling ball,<sup>138</sup> or Richard Fish conducts a vaudevillian cross-examination<sup>139</sup>—or is shown to be a rather inconsequential sideshow in the larger dramas of our lives. The cases rarely matter as much as Ally's doomed romances and the ongoing office hyjinx. The most consistent critique the show ever mounts is that the law simply doesn't matter that much. Perhaps the best example of this is when Ally and Ling agree to represent a young boy dying of leukemia who wants to sue God.<sup>140</sup> In a sense suing God is the ultimate confession of law's impotence (and arrogance). And yet it is this lawsuit that also betrays the deep conventionality of *Ally McBeal*, as naming God as a defendant is shown to be only an inventive gloss on standard legal trickery. In settlement negotiations with the incredulous lawyer for the church that has been named as a defendant for failing to help the family pay for experimental

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137. *Ally McBeal: The Oddball Parade* (Fox television broadcast, Feb. 28, 2000).

138. *Ally McBeal: You Never Can Tell* (Fox television broadcast, Nov. 23, 1998).

139. *Ally McBeal: Angels and Blimps* (Fox television broadcast, Feb. 8, 1999). Richard and John are representing a man accused of attempting to murder his friend after finding him in bed with his wife. Moments of Richard's cross-examination of the friend are pure Vaudeville:

Fish: "You know my client very well, don't you, Steve. Can I call you Steve?"

Witness: "My name is Rodney."

Fish: "Yes or no will do."

*Id.*

140. *Id.*

drug treatments, Ling says:

By naming God as a defendant, there isn't a newspaper in the country that won't glom onto it as one of those insipid human interest stories, and with the text under the headlines detailing how the boy's church won't help him pay for the experimental drug that could save his life, it makes my veins crimp. Come on Mr. Gale. You'll pay out because the amount would add up to less than the salaries of a full-time publicist and press secretary, which you'd need just to fend off the negative publicity.<sup>141</sup>

Though ostensibly very mild in its critique of law, through humor and preoccupation with the human psyche the show made room for alternative and more critical readings. Admittedly, this view of the critical potential of comedy is not the standard read of *Ally McBeal*. As much about sexual intrigue, neurosis and office drama as about law, the show was decried by many as insipid and sexist.<sup>142</sup> The characters were socio-economically the same characters that populated *LA Law*; they were attractive, wealthy professionals who got to spend their time worrying about face-bras, show frogs and apparitions of soul singers. But one of the things that made *Ally McBeal* different not only from *LA Law* but from most other shows was the way the characters worried and how that worry was visually and comically conveyed. The principle characters were unreformed neurotics whose sense of longing and incompleteness were central to their professional lives and whose neuroses were exposed through parody.

In much the same way, law looked different on *Ally McBeal*—its neuroses were also exposed through parody. The suggestion was certainly there that the law and our collective feelings about it were as unstable and incomplete as the show's characters. One reason this was both easy and effective to portray was because it parodied a set of legal images and tropes of trial practice that are so firmly ingrained in the popular imagination that they need no set-up, no elaborate explanation. The smallest wrinkle, gloss or odd elaboration can be funny and

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141. *Id.*

142. In fact, it inspired a popular debate about whether lead actor Calista Flockhart's anorexic figure and short-short skirts signaled the death knell of feminism. *Time* magazine featured Calista Flockhart as Ally McBeal on its cover under the headline "Is Feminism dead?" Ginia Bellafante, *It's All About Me!* *TIME*, June 29, 1998, at 54. See also Alex Kuczynski, *Calista Comes Clean*, *HARPERS BAZAAR*, Sep. 1998, at 503; Michael D. Goldberg, *Ally McBeal: feminist role model?*, *NAT'L. L.J.*, Apr. 5, 1999, at A12; Lynn Snowden, *Calista Bites Back*, *GEORGE*, May 1999, at 68. With now-classic postmodern self-consciousness, the show itself made a storyline out of the debate over Ally's hemline. In the course of representing a man fired from a feminist magazine for being a Baptist, Ally is called into the judge's chambers, and the judge says, "Sit. If you can." He tells her that her skirt length violates the implied dress code of his courtroom. When she appears before him again in her signature mini, she is held in contempt and the contempt hearing provides an occasion to explain why Ally's clothes are neither inappropriate nor sexist. When the judge says that risqué clothing undermines the credibility of the forum, Ally's sexy colleague and lawyer Nelle responds: "That very assumption endorses the myth that sexually attractive women can't have credibility. That's a prejudice. It's bad enough the legal profession is still an old boys club. Why should we have to come in here looking like old boys? . . . We've come to expect a bias. But not from judges. What's most disappointing here is you saw this woman perform in court, you heard her argue, she won her case. And you're still judging her on hemlines. What do we have to do?" *Ally McBeal: It's My Party* (Fox television broadcast, Oct. 19, 1998).



critical precisely because the courtroom image and script has been portrayed in popular culture so consistently for so long. Comedy certainly made it all more palatable, but it also arguably made it easier for the show to portray a deeply dysfunctional legal system, even if it is not a dysfunction for which there is a therapy.

Whereas *Ally McBeal* was a show ostensibly about law in which law played a relatively minor role, *The Simpsons* is a show ostensibly not at all about law in which law sometimes plays a central role. For fifteen seasons *The Simpsons* has been depicting lawyers and the legal system in a profoundly satiric and critical light. It is one of the few examples in either television or film of a show that is at once popular and potentially subversive. The show's secondary characters are the various townspeople of the fictional Springfield, and the recurring characters involved with law and governance are uniformly among the most incompetent and corrupt.<sup>143</sup> Lionel Hutz is Springfield's ambulance-chasing lawyer who displays diplomas from Harvard, Yale, MIT, Oxford, the Sorbonne and the Louvre in his strip mall office. Hutz is the paradigmatic shyster who carries an apple core in his empty briefcase and solicits business by handing out sponge cards and smoking monkey statuettes. The Mayor of Springfield is the corrupt and promiscuous Diamond Joe Quimby. Styled on any number of Kennedy men, Mayor Quimby is known for wife swapping, pot smoking and declaring meaningless holidays. Quimby's nemesis is Clancy Wiggum, the bumbling and incompetent Chief of Police who rivals Homer for the character with the lowest IQ and highest interest in donuts. Chief Wiggum often talks into his wallet and confuses DOAs with DWIs.

Perhaps more than any other show on television, *The Simpsons* is about popular culture and is full of allusions to movies and other television shows. In fact, in striking contrast to the main thesis of this article, *The Simpsons* has on a number of occasions taken classic and idealistic legal movies and turned them into brutally satiric television. In his comment on the role of law in *The Simpsons*, Kevin Ho has called the series a grand legal satire in that "truth and justice are never attained through the efforts of traditional legal actors. Rather, truth and justice are attained only through the efforts of children, or by abusing, sidestepping, or simply ignoring the legal system."<sup>144</sup> For this reason, *The Simpsons* may be the one show on television in which the portrayal of law does not always reproduce, in either crude or complex fashion, a dominant legal ideology. It is quite capable of being read as openly subversive in that it consistently finds legal and governmental institutions fundamentally corrupt. It can do this on television because it is animated, satirical and always closes with a happy ending. It thinly masks its brutal social commentary with humor and entertainment. *The Simpsons* can get away with subversion because it is equally capable of alternate decodings in which it is understood as a looney cartoon and nothing more. As Homer says (while revealing the top of his butt) in an episode discussed below, "Oh Marge, cartoons don't have

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143. See MATT GROENING, *THE SIMPSONS: A COMPLETE GUIDE TO OUR FAVORITE FAMILY* 44, 160 (1997).

144. Ho, *supra* note 11, at 276.

any deep meaning. They're just stupid drawings that give you a cheap laugh."<sup>145</sup>

One episode that takes law as a principal subject also parodies the classic jury film *Twelve Angry Men*.<sup>146</sup> In *The Boy Who Knew Too Much*,<sup>147</sup> Bart's forged note excusing him from school raises Principal Skinner's suspicions, and Skinner gives chase until Bart disappears by jumping into the passing car of Freddy Quimby. Freddy Quimby is the Mayor's dissolute nephew who is rich, well-connected and speaks with a Kennedy accent. Bart arrives at Freddy Quimby's birthday party, hides beneath a table, and witnesses a dispute between Freddy and a French waiter over the correct pronunciation of chowder (the waiter pronounces it "show-dair" and Quimby demeans him and insists that it is pronounced "chowdah").<sup>148</sup> Freddy Quimby is charged with assaulting the waiter, and Homer and Principal Skinner are both selected for the jury. Bart is the only one who knows that the waiter was actually injured by slipping on a Rice Krispies square, but he knows that if he comes forward Skinner will be able to expel him and send him to a Christian military school.

The lawyers, the jury and the judge are all portrayed in this episode as inept. The legal system is a farce. Lionel Hutz addresses the jury by saying, "Ladies and gentlemen, I'm going to prove to you not only that Freddy Quimby is guilty, but that he is also innocent of not being guilty."<sup>149</sup> Once the case goes to the jury, Homer is the holdout juror when everyone else is ready to vote for Quimby's guilt. But unlike the holdout in *Twelve Angry Men* who acts with integrity and a commitment to justice, Homer holds out for free cable. After asking his fellow jurors what the words "sequestered," "deadlocked" and "if" mean the following dialogue takes place:

Homer: So "if" we don't all vote the same way, we'll be "deadlocked" and have to be "sequestered" in the Springfield Palace Hotel. . .

Patty: That's not going to happen, Homer.

Jasper: Let's vote, my liver is failing.

Homer: . . .where we'll get a free room, free food, free swimming pool, free HBO – oooh, Free Willy!

Skinner: Justice is not a frivolous thing, Simpson. It has little, if anything to do with a disobedient whale. Now let's vote.

Homer: Uh, how are the rest of you voting?

Everyone: Guilty.

Homer, Okay, fine. How many S's in "innocent"?

Everyone: Aw.

Homer: I'm only doing what I think is right. I believe Freddy Quimby should walk

145. *The Simpsons: Mr. Lisa Goes to Washington* (Fox television broadcast, Sep. 26, 1991) [hereinafter *Mr. Lisa*].

146. *TWELVE ANGRY MEN* (United Artists 1957).

147. *The Simpsons: The Boy Who Knew Too Much* (Fox television broadcast, May 5, 1994).

148. *Id.* Freddy Quimby's pronunciation of chowder is a source of minor tension in Springfield. A newspaper headline in the episode reads: "Quimby Nephew Charged in Beating. Chowder Said Wrong." *Id.*

149. *Id.*

out of here a free hotel.<sup>150</sup>

The problem is resolved when Lisa prevails upon Bart to come forward, which he does long after testimony has concluded. The Judge allows Bart's testimony by saying, "Even though reopening the trial at this point is illegal and grossly unconstitutional, I just can't say no to kids."<sup>151</sup> Every aspect of the legal system is portrayed as dysfunctional. There is no commitment by anyone involved (except Lisa) to due process or just outcomes. And as in so many instances on *The Simpsons*, justice is done in the end in spite of the legal system. While one could read the show's happy ending as ultimately reassuring, in this case the more critical reading rings truer. The happy ending serves to accentuate our sense that there is no assurance that the right thing will happen unless we happen to be cartoons.

Another episode worth mentioning indicts not just law, but government and democracy more generally, and is an extended reference to the Frank Capra film *Mr. Smith Goes to Washington*.<sup>152</sup> In "Mr. Lisa Goes to Washington," Lisa's entry for the Reading Digest's "Patriots of Tomorrow" essay contest wins her a spot in the finals and her family an all-expense-paid trip to Washington, D.C.<sup>153</sup> Once there, Lisa witnesses Congressman Bob Arnold taking a bribe from a logging interest, and her faith in democracy is destroyed. At the finals of the essay contest she abandons her patriotic essay "The Roots of Democracy" and substitutes a new essay, entitled "Cesspool on the Potomac," which better reflects her experience of Washington. Her essay begins, "The city of Washington was built on a stagnant swamp some 200 years ago and very little has changed; it stank then and it stinks now. Only today, it is the fetid stench of corruption that hangs in the air."<sup>154</sup> Alarmed that a child has lost her faith in her country, one of the judges notifies a Senator, who contacts the FBI and within minutes they set up a sting operation and catch Congressman Arnold taking a bribe to allow drilling in Teddy Roosevelt's head on Mount Rushmore. His expulsion from Congress is approved by the President before the essay contest even concludes. Although Lisa doesn't win the contest, her faith in democracy is restored. She exclaims, "I can't believe it, the system works!"<sup>155</sup>

The *Mr. Lisa* plotline effectively follows the structure of *Mr. Smith*, exposing deep corruption running to the far corners of Congress but finding that against all odds righteousness triumphs at the very end. But where Capra's movie was about the power of innocence, *The Simpsons* version is more about our collective fantasy about the power of innocence and our willingness to be placated as easily as children. Indeed, *Mr. Lisa Goes to Washington* makes fun of the way in which films and television programs quickly and neatly resolve political and legal

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150. *Id.*

151. *Id.* Skinner, by the way, is impressed with Bart's bravery and only gives him four months of detention. *Id.*

152. *MR. SMITH GOES TO WASHINGTON* (Columbia Pictures 1939).

153. *Mr. Lisa*, *supra* note 145.

154. *Id.*

155. *Id.*

conflicts, believing that audiences will be satisfied by the punishment of the bad apple even when it is evident that the rot runs to the roots. To help make this point, there is a stop watch running on the screen beginning when the FBI is notified until Congressman Arnold is jailed and becomes a born-again Christian. The total elapsed time is about 20 minutes. By parodying films that rely on the gullibility of viewers, *The Simpsons* implicitly asks its own viewers not to be gullible. Laugh until you wet your pants, but don't be suckered by what you see on TV. Of course, if *The Simpsons* asks viewers to be skeptical, that skepticism should extend to the show itself. And there is certainly room to argue that for all its sarcasm and lefty politics, *The Simpsons* doesn't offer much critique.<sup>156</sup> While less dominant, it is plausible to read this and many other episodes as simply recapitulating the ideological crudeness of the films and shows it satirizes.

While we believe there is tremendous critical potential in humor, it is less clear that that potential is fully realized in television comedies about the law. What is clear is that ideological messages are usually more unstable in comedy, allowing for complex and even subversive ideological readings by viewers. Although series like *The Practice*, *Ally McBeal*, and *The Simpsons* prevent the assertion of a truly monolithic picture of crude ideological reproduction on network television, they are the exceptions rather than the rule. The Birmingham School was right to insist on the possibility of multiple decodings, as they give us a richer account of television images and narratives. Yet for all the possible alternative readings of legally themed television shows, taken as a whole their rather consistent messages suggest a limit to the theory of decoding. The vast majority of past and current images of law on television support the conclusion that television serves as a consistently effective instrument for the communication of the kind of crude ideological vision of law and its relationship to justice that the Frankfurt School envisioned.

## B. LAW AT THE MOVIES

### 1. A Brief History of Legal Ideology in Film

The scholar David Papke has written about the concentration of movies released between the late 1950s and the early 1960s that make up what has been called "the finest hour" of American courtroom cinema.<sup>157</sup> He argues that these immensely popular films, such as *12 Angry Men*, *Witness for the Prosecution*,<sup>158</sup> *Anatomy of a*

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156. In her probing essay on "Mr. Lisa Goes to Washington" and infantile citizenship, literary theorist Lauren Berlant claims that the show actually fits within the mold of national pilgrimage narratives that it parodies, in which the power of the infantile citizen to expose is eventually converted to political amnesia and the infantile citizen regains an innocent national self-identity. Lauren Berlant, *The Theory of Infantile Citizenship*, in *BECOMING NATIONAL: A READER* 495 (Geoff Eley & Ronald Grigor Suny eds., 1996).

157. David Ray Papke, *Law, Cinema, and Ideology: Hollywood Legal Films of the 1950s*, 48 *UCLA L. REV.* 1473, 1474 (2001) (citing THOMAS J. HARRIS, *COURTROOM'S FINEST HOUR IN AMERICAN CINEMA* xiii (1987)).

158. *WITNESS FOR THE PROSECUTION* (United Artists 1957).

*Murder*,<sup>159</sup> *Inherit the Wind*<sup>160</sup> and *To Kill a Mockingbird*, were "one of the most concentrated and powerful projections of . . . law-related ideology in American cultural history."<sup>161</sup> Papke locates their ideological power in the way they all championed the rule of law, glorified lawyers, and portrayed a neutral, objective legal system that reached just results.<sup>162</sup> Papke rightly historicizes this period of movie-making, pointing out that it came on the heels of McCarthyism's attack on Hollywood, at a time when blacklists, loyalty oaths, and even jail time were part of the business of making movies.<sup>163</sup> Influenced by the politics of the period, these movies extolled American values, particularly the central value of respect for the rule of law. But in contrast to the anti-Communist propaganda also produced at the time, these films were made by talented writers, actors and directors; they were integrated with popular beliefs; they were enormously popular; and they were aesthetically impressive.<sup>164</sup>

That there was a concentration of law-related ideological movies in the late 1950s should not suggest that most American films were less ideological or more subversive either before or after this period. Robert Sklar has argued that McCarthyism made movies less iconoclastic,<sup>165</sup> but amid their iconoclasm was always a healthy share of ideological reproduction. At the very beginning of the medium in the first decades of the twentieth century, for example, D. W. Griffith, coupled Victorian vice crusading with artistic innovation. He revolutionized and legitimized film, brought it to the middle classes and never abandoned his passion for free labor as against big business and virtuous, Christian families as against modern, urban chaos and seduction.<sup>166</sup> In his four-hour epic, *Intolerance*,<sup>167</sup> Griffith tells a story of a man whose boss sends him to jail for a crime he didn't

159. ANATOMY OF A MURDER (Columbia Pictures 1959).

160. INHERIT THE WIND (Lomitas Productions 1960).

161. Papke, *supra* note 157, at 1483.

162. *Id.* at 1476-77. Although one might quibble with his inclusion of *Anatomy of a Murder* in a list of films that champion the rule of law.

163. *Id.* at 1487-89. See ROBERT SKLAR, MOVIE-MADE AMERICA: A CULTURAL HISTORY OF AMERICAN MOVIES 249-68 (1976). Sklar argues that the damage of McCarthyism "to Hollywood was very nearly fatal. . . . Movies were always less courageous than some organs of information and entertainment, but they were more iconoclastic than most, offering a version of American behavior and values more risqué, violent, comic and fantastic than the standard interpretation of traditional cultural elites. It was this trait that gave movies their popularity and their mythmaking power. And it was this trait that the anti-Communist crusade destroyed." *Id.* at 267.

164. Papke, *supra* note 157, at 1491. Their popularity and to a certain extent their quality are evidenced by the fact that as a group these legal films "won twenty-two of a possible twenty-eight Oscar nominations for best writing, directing, acting, and picture." *Id.* at 1475.

165. See SKLAR, *supra* note 163. John Frankenheimer's *The Manchurian Candidate*, for example, was a thinly-veiled assault on both McCarthy and the atmosphere that allowed for his ascendancy. THE MANCHURIAN CANDIDATE (United Artists 1962).

166. LARY MAY, SCREENING OUT THE PAST: THE BIRTH OF MASS CULTURE AND THE MOTION PICTURE INDUSTRY 60-95 (1980).

167. INTOLERANCE (Delta Entertainment 1916). Griffith's values were not just projected on the screen, but employed in the studio. When the actor who played Christ in *Intolerance* was arrested for sexual misconduct and deported, Griffith struck his name from the credits. MAY, *supra* note 166, at 86. Earlier, during the filming of *Birth of a Nation*, Griffith used white actors in blackface so that the white actresses would not have to be touched by actual black actors. *Id.* at 83.

commit. But his true love gets the real culprit to confess and chases down the governor's train with the new evidence. She catches up with the governor as the noose is being slipped over the man's head. "With the governor's swift pardon, the audience learns that in modern America, law is on the side of the good citizen."<sup>168</sup> While examples of more ideologically challenging films can be found during this time, perhaps most notably Mervyn LeRoy's *I Am a Fugitive from a Chain Gang*,<sup>169</sup> a story of false accusation and unresolved, legally-sanctioned injustice, this early period of American cinema was dominated by positive images of the relationship between law and justice.<sup>170</sup> And ironically, as Griffith made movie after movie extolling chaste individualism and economic autonomy, the immense popularity of his films also helped to create the culture industries which he himself sought to escape and which the Frankfurt School would argue were inescapable.<sup>171</sup>

Perhaps the best evidence that the film industry was also thoroughly involved with the ideological portrayal of law and legal institutions was the Hays Code and its impact on the substantive depiction of law in American popular film for more than four decades. While network television may have perfected the crude form of

168. MAY, *supra* note at 166, at 85. This one storyline does not do justice to the entire film, which Pauline Kael called, "perhaps the greatest movie ever made and the greatest folly in movie history." PAULINE KAEI, 5001 NIGHTS AT THE MOVIES 280 (1982).

169. *I AM A FUGITIVE FROM A CHAIN GANG* (Warner Brothers 1932). Based on the writings of a man who escaped from a chain gang and ultimately became a successful magazine editor (but who always lived in fear of his identity being exposed), the film tells the story of a man framed for a robbery and sentenced to ten years hard labor. He escapes and creates a life for himself as a respected civil servant, remaining free for many years. He is, however, blackmailed into marrying a woman he doesn't love (and leaving the woman he does) because she knows his secret. Later, when she is poised to turn him in, he turns himself in on the assurance from state officials that he'll only have to serve ninety days. The officials renege on the deal and the man escapes again. The film ends with a brief, heart-breaking meeting between the man and his true love. The final shot is from her perspective, watching him as he backs away from her and shakes his head insistently at the desperate questions she shouts: "Is there something I can do? Do you need money? Food?" Finally she cries, "But how do you live?" The screen goes black, and you hear him reply, "I steal," and then the sound of his running footsteps disappearing into the darkness, into a life of unending pursuit, and now, after all he has suffered at the hands of an unjust legal system, real lawlessness. See THE MOVIE GUIDE 368 (James Monaco ed., 1992).

170. The most vivid exceptions are non-American movies, such as Fritz Lang's *M*, a noir classic made in German in 1931. In *M*, the police's desperate search for a serial killer of children disrupts the business of the criminal underworld, so the criminal "unions" resolve to track down the killer themselves. The police and criminal searches parallel each other, but the criminals are more effective (the beggars union is able to track activity on every city block) and they capture the killer first. The serial killer, played brilliantly by Peter Lorre, is brought to a "trial" staged by the criminals, who appoint the accused an attorney and assure him that they are legal experts based on all the time they have collectively served in prison. Lorre begs to be turned over to the law, but is refused. Although his ultimate confession to the killings, to his lack of control, and to the way his own acts haunt him is powerful, and despite his attorney's translation of these psychological claims into legal ones, the mob of "jurors" has none of it. The police arrive just as the crowd surges forward to kill him. The last scene is a formal and sterile courtroom, a stark contrast to the passionate throng that composed the criminal trial. The judge takes the bench and the last shot is of the grieving mothers whose children have been killed saying, "This won't bring back our children." The film is, from start to finish, an indictment of law enforcement's effectiveness and law's utility. *M* (MORDER UNTER UNS) (Nero [Germany] 1931).

171. MAY, *supra* note 166, at 93-95.

ideology reinforcement, the film industry originated it in the Hays Code, which is an instructive example of just how crude ideology reinforcement and legal mythologizing can be.

The Hays Production Code was adopted by motion picture production companies in 1934 and regulated the film portrayal of a number of topics, including law and crime.<sup>172</sup> The production code grew out of the social reform movements of the 1920s, which objected to portrayals of sex and violence in the movies and which were able to exert substantial political pressure in favor of federal regulation of the film industry.<sup>173</sup> In response to threats by Congress to implement movie censorship statutorily, Hollywood executives agreed to implement the Hays Code. Because one of its primary purposes was to respond to the violent gangster films of the Depression era, the Hays Code included numerous provisions regulating movie portrayals of the legal system and criminal activity. One of the code's three guiding principles instructed producers that: "Law—divine, natural, or human—shall not be ridiculed, nor shall sympathy be created for its violation."<sup>174</sup> The "Reasons Underlying the General Principles" elaborated:

By human law is understood the law written by civilized nations.

1. The presentation of crimes against the law is often necessary for the carrying out of the plot. But the presentation must not throw sympathy with the crime as against the law nor with the criminal as against those who punish him.
2. The courts of the land should not be presented as unjust. This does not mean that a single court may not be represented as unjust, much less that a single court official must not be presented this way. But the court system of the country must not suffer as a result of this presentation.<sup>175</sup>

172. The code was named after Will Hays, head of the motion picture trade association, who was instrumental in forming the association's Committee on Public Relations in response to public demands regarding the moral content of movies. See LEONARD J. LEFF & JEROLD L. SIMMONS, *THE DAME IN THE KIMONO: HOLLYWOOD, CENSORSHIP, AND THE PRODUCTION CODE FROM THE 1920S TO THE 1960S* 290 (1990).

173. Alison M. Parker, *Mothering the Movies*, in *MOVIE CENSORSHIP AND AMERICAN CULTURE* 73, 82-85 (Francis G. Couvares ed., 1989).

174. Motion Picture Producers and Distributors of America, Production Code Administration, *The Motion Picture Production Code*, in *THE CENSORSHIP PAPERS: MOVIE CENSORSHIP LETTERS FROM THE HAYS OFFICE, 1934 TO 1968* 208 (Gerald Gardner ed., 1987) [hereinafter *THE CENSORSHIP PAPERS*].

175. Motion Picture Producers and Distributors of America, Production Code Administration, *The Motion Picture Production Code*, in *THE DAME IN THE KIMONO*, *supra* note 172, at 290. Relevant portions of the "Particular Applications" read as follows:

"Crime:

Crime shall never be presented in such a way as to throw sympathy with the crime as against law and justice, or to inspire others with a desire for imitation.

Methods of crime shall not be explicitly presented or detailed in a manner calculated to glamorize crime or inspire imitation.

Action showing the taking of human life is to be held to the minimum. Its frequent presentation tends to lessen regard for the sacredness of life.

Suicide, as a solution of problems occurring in this presentation of screen drama, is to be discouraged unless absolutely necessary for the development of the plot, and shall never be justified, or glorified, or used specifically to defeat the ends of justice.

Thus, the code prohibited any positive portrayal of lawbreaking and, in some cases, discouraged any portrayal at all, even if negative. Additionally, the code required the positive portrayal of law enforcement and the justice system as a whole.

Within the motion picture trade association was the Production Code Administration, the office responsible for administering the Hays Code. It exercised substantial power over the content of films produced by association member studios. Studios were required to submit treatments and scripts for every movie they produced for a decision on their compliance with the production code, direct any appeals to the trade association board, and pay a \$25,000 fine for releasing films in violation of the code; additionally, member theaters were prohibited from showing films without approval by the Production Code Administration.<sup>176</sup> Between 1934 and 1968, when the production code was replaced by the MPAA ratings system still in use today, the Administration reviewed over five thousand motion pictures.<sup>177</sup>

The Hays Code was, in essence, ideological control by the culture industries in its crudest sense. And the control was remarkably effective, at least for a while. The Production Code Administration deployed these provisions of the code to censor such well-known crime-related and "noir" movies as *The Maltese Falcon*,<sup>178</sup> *The Postman Always Rings Twice*,<sup>179</sup> *Double Indemnity*,<sup>180</sup> and *Angels with Dirty*

Excessive flaunting of weapons by criminals shall not be permitted.

There shall be no scenes of law-enforcing officials dying at the hands of criminals, unless such scenes are absolutely necessary to the plot.

Pictures dealing with criminal activities in which minors participate, or to which minors are related, shall not be approved if they tend to incite demoralizing imitation on the part of youth.

**Murder:**

The technique of murder must not be presented in a way that will inspire imitation.

Brutal killings are not to be presented in detail.

Revenge in modern times shall not be justified.

Mercy killing shall never be made to seem right or permissible.

Drug addiction or the illicit traffic in addiction-producing drugs shall not be shown if the portrayal:

Tends in any manner to encourage, stimulate, or justify the use of such drugs; or

Stresses, visually or by dialog, their temporarily attractive effects; or

Suggests that the drug habit may be quickly or easily broken; or

Shows details of drug procurement or the taking of drugs in any manner; or

Emphasizes the profits of the drug traffic; or

Involves children who are shown knowingly to use or traffic in drugs.

Stories on the kidnapping or illegal abduction of children are acceptable under the code only

When the subject is handled with restraint and discretion and avoids details, gruesomeness, and undue horror; and

The child is returned unharmed."

LEFF & SIMMONS, *supra* note 172, at 208-09.

176. *Id.* at 52.

177. THE CENSORSHIP PAPERS, *supra* note 174, at xi.

178. THE MALTESE FALCON (Warner Bros. 1941).

179. THE POSTMAN ALWAYS RINGS TWICE (MGM 1946).

180. DOUBLE INDEMNITY (Paramount 1944).



*Faces*.<sup>181</sup> Letters from the Hays office instructed the producers of *The Maltese Falcon*, for example, that “[Sam] Spade’s speech about the district attorney should be rewritten to get away from characterizing most district attorneys as men who will do anything to further their careers.”<sup>182</sup> In another instance, the Production Code Administration objected to the original script for *Double Indemnity* because “[a]t the end of the story, the crime is confessed . . . to the auditors of the insurance company, who proceed thereupon to withhold this information from the proper legal authorities and successfully effect a gross miscarriage of justice by arranging for the escape of the two murderers.”<sup>183</sup>

The Hays Code was an example of a very public and concerted effort on the part of the motion picture industry to promote a particular ideological vision of the law and legal institutions, one that censored realistic portrayals of criminal activity, prohibited critical depictions of law enforcement officials and attorneys and mandated that law be portrayed as a means to justice. The sheer volume of these images helped to naturalize the ideological messages that were so heavily encoded in many of these cultural texts. Yet for all its influence, the Hays Code was not monolithically enforced. In one sense the Production Code Administration under-enforced its own rules, by paying less attention to low-profile films and by its own intimate engagement with high-profile films. This may be most evident in the case of film noir, the stylized Hollywood thrillers of the 1940s that dealt consistently with the law.<sup>184</sup> As Norman Rosenberg points out in his assessment of the Production Code Administration’s ongoing negotiations over *The Big Sleep*,<sup>185</sup> the Code became “something of an enabling mechanism for classical Hollywood movie-making.”<sup>186</sup> Because the Production Code Administration could not begin to thoroughly sanitize a movie about blackmailers, pornographers, slutty society girls, homosexuals, drug addicts and murderers, it instead transferred some of its objectionable material to the unredeemable characters and reduced other material to innuendo. Indeed, the visual innuendos only enhanced the multiplicity of readings these regulated films afforded. Rosenberg asserts that the motion picture industry worked with the Production Code Administration “to devise an extensive array of cinematic codes and conventions through which Hollywood movies could represent code-regulated issues such as law and sexuality.”<sup>187</sup>

Perhaps most amazing is how consistently current law-related television shows and movies still conform to the edicts of the now defunct Hays Code. In this sense, the Hays Code could be said to have been over-enforced in the ongoing censoring

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181. ANGELS WITH DIRTY FACES (Warner Bros. 1938). THE CENSORSHIP PAPERS, *supra* note 174, at 38-49.

182. THE CENSORSHIP PAPERS, *supra* note 174, at 39.

183. *Id.* at 45-46.

184. See Norman Rosenberg, *Looking for Law in All the Old Traces: The Movies of Classical Hollywood, the Law, and the Case(s) of Film Noir*, 48 UCLA L. REV. 1443, 1450 (2001).

185. THE BIG SLEEP (Warner Bros. 1946).

186. Rosenberg, *supra* note 184, at 1456-57.

187. *Id.* at 1456 (using as an example the fade-to-dark after a couple embraces to signal that sex follows).

power of its cultural imprint.<sup>188</sup> The fact is that despite the relative freedom in film making in the post-Code era (the Code and its enforcement mechanisms were effectively dismantled in the mid-1960s), much of the content of contemporary popular American film continues to fit the crude model of ideology reinforcement that we associate with Hollywood film during the Hays Code and with the vast majority of network television. Movies like *Class Action*,<sup>189</sup> *The Untouchables*,<sup>190</sup> *A Few Good Men*,<sup>191</sup> *Philadelphia*,<sup>192</sup> *The Client*,<sup>193</sup> *Runaway Jury*,<sup>194</sup> and *Minority Report*,<sup>195</sup> among others, while likely to portray some negative images of lawyers or the legal system, continue to tell stories of good guys defeating bad guys, the triumph of the law and the attainment of justice.

Like television, crude ideological reproduction in law-related movies is not the only story one can tell. Unlike television, however, there are abundant examples of films which are open to a greater variety of ideological readings and some which are fundamentally critical of the legal system, the government or the prevailing moral order. We discuss a number of these in detail in the next section. One example will help illustrate both the greater political and ideological license that has historically been available in film, as well as the power of the Hays Code to determine cultural messages. The cinematic history of *Chicago*,<sup>196</sup> winner of the 2003 Academy Award for Best Picture, is long and varied. The story, which centers on the murder trials of two women charged with killing their lovers, was originally written as a play by Maurine Watkins, an African-American reporter for the Chicago Tribune, who had covered the trials in 1924.<sup>197</sup> Her fictionalized play was produced on Broadway<sup>198</sup> and was soon made into a film called *Chicago*,<sup>199</sup> released before the Hays Code in 1927.<sup>200</sup> In the play and the original movie two clearly guilty murderers succeed in manipulating the legal system in order to avoid punishment.

However, when the film was remade in 1942, during the Code years, the title changed and so did the story. In *Roxy Hart*<sup>201</sup> the lead character does not commit the murder, is falsely charged and succeeds in fighting the charges and winning her freedom. The changes in this version were the result of the "censorship [that] had overpowered Hollywood. The then-powerful Catholic Legion of Decency had

188. See generally CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION (Robert C. Post ed., 1998).

189. CLASS ACTION (Twentieth Century Fox 1991).

190. THE UNTOUCHABLES (Paramount Studios 1987).

191. A FEW GOOD MEN (Columbia 1992).

192. PHILADELPHIA (Tristar 1993).

193. THE CLIENT (Warner Brothers 1994).

194. RUNAWAY JURY (Twentieth Century Fox 2003).

195. MINORITY REPORT (Twentieth Century Fox/Dreamworks 2002).

196. CHICAGO (Miramax 2002).

197. Annie Sweeney, *The Truth Behind 'Chicago'*, CHICAGO SUN-TIMES, Mar. 23, 2003, at 27.

198. MAURINE WATKINS, CHICAGO (1926).

199. CHICAGO (DeMille Pictures Corporation 1927).

200. Andy Seiler, *Pssstttt! 'Chicago' has a secret past!*, USA TODAY, Mar. 25, 2003, at 3D.

201. ROXY HART (Twentieth Century Fox 1942).

blackballed the play, and drastic sanitizing was necessary to get it to the screen.”<sup>202</sup>

The story returned again in 1969, this time back on Broadway as a musical whose plot line closely resembled that of the original play.<sup>203</sup> While the 1969 run was not successful, a 1990 revival was an overwhelming success, “especially after the O.J. Simpson trial made the play’s once-shocking concept—that a trial could be entertainment and the guilty could go free—conventional wisdom.”<sup>204</sup> Finally, the recent Academy Award-winning motion picture, adapted from the latest Broadway version, returns to the original premise that law and the legal process are a spectacle prone to manipulation by the clever and amoral, and ends with the triumphant acquittal of the two guilty and remorseless murderers.

The production tale of *Chicago* says quite a bit about the effects of history and political eras on the ideological content of popular culture; namely, that while the potential always exists for a range of messages about the law and legal institutions, in certain times and places powerful corporate and social forces can and do enforce the portrayal of rather crude ideological images of law in mass-mediated popular culture. But this should not be taken to suggest that the reigning ideas and relative restrictions of any historical moment are ever completely represented in popular culture. As film noir demonstrates, for all the power of the Hays Code, films critical of law were still released during the period of the Code. There has always been enough artistry in film-making and enough interpretive power located in cultural consumers that monolithic ideological control is impossible. At the same time, however, there has always been enough muscle in the culture industries that radical or subversive ideological messages are still rare. The widespread refusal of distributors and theaters to show *Fahrenheit 9/11* is a case in point.<sup>205</sup> The film argues that the sitting president stole the election that put him in the White House and then started a war and sacrificed American lives to keep himself there. Not many industry executives wanted to touch this film, and before the rise of the independent film movement it would probably never have been seen, let alone made.

## 2. What’s Playing?

It is striking that before and after (and occasionally during) the Hays Code era, popular American film has provided a much greater array of complex and ambivalent images of law and its relationship to justice than one would expect to see under the Frankfurt School model. Unlike most depictions of law on television,

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202. Seiler, *supra* note 200.

203. CHICAGO: A MUSICAL VAUDEVILLE (Bob Fosse 1975).

204. Seiler, *supra* note 200.

205. FAHRENHEIT 9/11 (Miramax 2004). After Disney, the parent company of Miramax, refused to distribute the film, it took some time to find another distributor. Even then, some theaters declined to show it. See, e.g., Charlotte Higgins, *Fahrenheit 9/11 Could Light Fire Under Bush*, THE GUARDIAN, May 17, 2004, at 8. The film was finally distributed by Lion’s Gate and became a surprise financial success. As of January 2005, the gross domestic revenues for the film were nearly \$119 million. Box Office Mojo, *Fahrenheit 9/11, Information*, available at <http://www.boxofficemojo.com/movies/?id=fahrenheit911.htm> (last visited Jan. 10, 2005).

law in film is frequently open to readings that are consistent with the complex model of ideology reinforcement and, every so often, to readings that are simply subversive.

A survey of some of the more important legally themed popular films of the past few decades demonstrates an impressive array of ideological attitudes towards the law ranging from the romantic to the utterly dismissive. In contrast to the abundance of positive images of the law one sees on television, one of the most consistent ideological postures in law-related movies is ambivalence toward the law. Indeed, these examples of the kinds of ambivalence that popular films display about law and legal institutions are sufficiently numerous to be separated into at least three useful categories: films that depict the human costs law exacts, especially the costs of justice; films that depict lawyers as ineffective at securing justice (or even as directly obstructionist); and films that have law-breakers as their primary heroic figures. While many of the films that fit within these categories do not provide the kind of crudely positive images of law that are pervasive in popular culture, they nonetheless often rest on hegemonic concepts of transcendent justice and morality which play a foundational role in the development and communication of crude ideological images of law. In other words, while many of these films present a more complex ideological picture, most are not essentially subversive. In this section we discuss some examples of films that are characteristic of these three categories in order to show the nuanced versions of ideological reproduction evident on the big screen.

a. *The Man Who Shot Liberty Valence*, *The Sweet Hereafter* and *the Costs of Law*

*The Man Who Shot Liberty Valence* was released by Paramount in 1962,<sup>206</sup> in the waning days of the Hays Code.<sup>207</sup> Written by James Warner Bellah and Willis Goldbeck (based on a magazine article written by famed Western author Dorothy M. Johnson)<sup>208</sup> and directed by legendary Hollywood maverick John Ford, the film addresses the relationships of law and legal institutions to the promotion of justice and to the broader development of civilizing social institutions.<sup>209</sup> It looks with

206. *THE MAN WHO SHOT LIBERTY VALANCE* (Paramount Pictures 1962).

207. By this point the Code had come under attack and was becoming difficult to enforce.

208. "A journalism professor at the University of Montana at the time the film was produced, Johnson was a well-regarded author of sophisticated Western fiction containing powerful historical resonances and often a strongly allegorical bent. Her stories 'The Hanging Tree' and 'A Man Called Horse' were made into films as well." JOSEPH MCBRIDE, *SEARCHING FOR JOHN FORD* 624 (2001).

209. These themes have inspired a number of legal scholars to write about the film. See, e.g., Michael Bohnke, *Myth and Law in the Films of John Ford*, 28 J.L. & SOC'Y 47 (2001) (exploring the interrelated concepts of myth, law and legitimacy in the movie); Steven Lubet, *The Man Who Shot Liberty Valence: Truth or Justice in the Old West*, 48 U.C.L.A. L. REV. 353 (2000) (imaginatively recreating of the trial generated by Liberty Valence's murder); John Marini, *Western Justice: John Ford and Sam Peckinpah on the Defense of the Heroic*, 6 NEXUS 57 (2001) (characterizing Ranse Stoddard and Tom Doniphon as embodiments of the public and private and the role of both in the rule of law); Timothy P. O'Neill, *Two Concepts of Liberty Valence: John Ford, Isaiah Berlin, and the Tragic Choice of the Frontier*, 37 CREIGHTON L. REV. 471 (2004) (discussing the film's portrayal of the role of the law

ambivalence on the central role of law in civilizing and subduing the mythic American frontier. Lightly regarded by contemporary film critics as, among other things, an unsophisticated "parody of Mr. Ford's best work," the film's stature has grown considerably over the past two decades.<sup>210</sup> A recent biographer of Ford observes that "[w]ith its profoundly skeptical reexamination of American history and mythology, a prophetic quality in anticipating the public's loss of faith in government, and an acknowledgement of the growing brutality in American life and in the Western genre, *The Man Who Shot Liberty Valance* now clearly stands out as the most important American film of the 1960's."<sup>211</sup>

The film, which Ford shot in black and white long after almost all Hollywood films were produced in color, is told as a flashback through the eyes of an old man, a U.S. Senator named Ransom Stoddard who recounts to a local journalist the gripping story of why he has returned to the small frontier town of Shinbone for the funeral of the long-forgotten Tom Doniphon. Ford's choice of the black and white cinematography serves many of his goals, not the least of which is providing the kind of surreal and uncertain mood that characterizes distant memory.<sup>212</sup> In this case, the memory is both private and public: the film is the story of these two men, Stoddard and Doniphon, as well as a nostalgic account of a changing nation and the personal and collective costs of that national change. The bare, lifeless sets and the strange, sometimes poor lighting emphasize the story Stoddard tells, as well as his unreliability as a narrator—at least if we are to judge by the visual quality of his remembrance.<sup>213</sup>

Jimmy Stewart plays the narrator Stoddard, both the older man at the beginning and end of the movie, as well as the young attorney "fresh out of law school, bag full of law books,"<sup>214</sup> who as the story begins, is traveling west in a stage coach, expressly inspired by Horace Greeley's challenge to go west to seek fame, fortune, and adventure. But before Stoddard makes it to Shinbone, his stagecoach is held up by a band of outlaws. Stoddard's naiveté and innocence are evident as he

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in the development of civilization); Post, *supra* note 18 (using the film to investigate the cultural link between law and lawlessness).

210. MCBRIDE, *supra* note 208, at 624-25.

211. *Id.* at 623.

212. As Scott Eyman writes:

Although Paramount would have undoubtedly preferred that *The Man Who Shot Liberty Valance* be in color, Ford stood firm against everybody, even William Clothier [the film's cameraman]. "I didn't like the idea [of black and white]," said Clothier. "Color was becoming more and more necessary in the studio's eyes, and I liked working in color." He said, "God damn it, we're going to do it in black and white; it shouldn't be in color." Ford felt the key scene of the film was the gunfight in the street between Ransom Stoddard and Liberty Valance, and he didn't want that in color. Once the scene was edited, Ford said to Clothier, "See, you got a damn good sequence out of that. It wouldn't have been as good in color."

SCOTT EYMAN, *PRINT THE LEGEND: THE LIFE AND TIMES OF JOHN FORD* 490 (1999).

213. LINDSAY ANDERSON, *ABOUT JOHN FORD 180-81* (1981). Anderson argues that Ford's work suffered from his impatience with the demands of spectacle and his almost complete disregard for the set and lighting, but that the visual starkness, the lack of "decorative distraction," also threw the power and richness of the story into relief. *Id.*

214. *THE MAN WHO SHOT LIBERTY VALANCE*, *supra* note 206.

confronts the bandits, asking "what kind of men are you?!"<sup>215</sup> The lead outlaw is none other than the famed and feared Liberty Valance (played passionately by Lee Marvin), a local bandit who terrorizes the area, and who responds to Stoddard's question by smacking him across the face with the hilt of a silver-tipped bullwhip. "This kind, Dude. Now what kind of man are you, Dude?"<sup>216</sup> Liberty Valance's question goes to the heart of the narrative, and Stoddard's response, as he picks himself up out of the dust and bravely faces Valance again, provides the starting point for his character's remarkable development, and for the development of the concept of law and legal establishment in the film: "I am an attorney at law, duly licensed by the territory. And you may have us in your guns now, but I will see you in jail for this!"<sup>217</sup>

Valance seems amused at first by the seemingly empty threat of criminal prosecution from such a pitiful and powerless creature (who is infinitely more likely to be dead in a few seconds than to live long enough to see Valance brought to justice), but when he comes across Stoddard's law books he explodes with fury. There is something about the threat of law, however remote, to Valance himself but also to the entire social order, that entirely unhinges Valance. What had been an orderly business transaction becomes frantic and brutal. Valance tears the pages from one book, and then singles Stoddard out for a savage beating that only ends when his lackeys forcibly pull Valance away. But before the attack begins, Valance takes off his bandana, demonstrating his utter lack of concern at being identified, and says, "Lawyer, huh? I'll teach you law. *Western* law!"<sup>218</sup>

This early scene might well lead a first-time viewer to reasonably assume that she is about to witness some version of a stock story in which the neophyte lawyer, against all odds, triumphs over the vicious outlaw in an allegory of the arrival of justice and civilization to the Wild West. But the film, from a director who made many films with those themes and that structure, takes a drastically different turn.<sup>219</sup> Ford offers instead an intriguing version of the stock story but with an oppositional reading built into it; the oppositional reading is not just decoded by the viewer, but clearly encoded by the filmmaker. Indeed, it is an eloquent, elegiac anti-Western by one of the most influential and effective architects of the dominant Western motif of the civilizing influence of legal justice.<sup>220</sup> It is an allegory of

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215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. "A sweet gallantry had been the keynote quality of Ford's ever since *Straight Shooting*, but *The Man Who Shot Liberty Valance* overwhelms that with sadness. In movies as disparate as *The Grapes of Wrath*, *My Darling Clementine*, and *The Searchers*, Ford had nudged his characters toward a final ascendance to myth; now, in *Liberty Valance*, he begins with myth and methodically dismantles it on the way to a mournful irony, utterly undercutting the newspaperman's aphorism ['When the legend becomes fact, print the legend'] that has become famous." EYMAN, *supra* note 212, at 491.

220. Various Ford biographers have suggested that "Ford's vision of American had darkened" late in his life, and Liberty Valance can be seen as a kind of reexamination of themes that he had presented, in what in retrospect seemed a far too uncritical manner. See MCBRIDE, *supra* note 208, at 631-34.

sorts, or in the estimation of critic Lindsay Anderson,<sup>221</sup> a parable about two different sorts of civilizations: one ruled by Western law and the other ruled by book law.<sup>222</sup> But the Western law that emerges in *The Man Who Shot Liberty Valance* is not Valance's brutal version, but the moral, resolute, laconic version of Tom Doniphon (played by John Wayne), the only man strong enough to protect the town from Liberty Valance. The stories of these two men, "Tom and Ranse, the man of the past and the man of the future, the man of action and the man of ideas, that form the substance of the parable."<sup>223</sup> And it is as much about the different kinds of law these two men represent. What differentiates this film is not the ending—we know how it ends because history has already decided it—but its elegiac mood: Ford is unusually attentive to the price we have paid for accepting book law.

After being left for dead by Valance and his men, Stoddard is saved by Doniphon, who happens to ride by with his hired man Pompe (Woody Strode). Doniphon takes him into Shinbone and places him in the care of Hallie (Vera Miles), a young waitress at Pete's Restaurant whom Doniphon intends to marry. When Stoddard regains consciousness, he immediately wants to know the outlaw's identity, again expressing his desire to use the law to stop Liberty Valance. Doniphon is amused by Stoddard and hands him a gun saying, "I know those law books mean a lot to you, but not out here. Out here a man settles his own problems."<sup>224</sup> Stoddard is aghast at the idea:

You know what you are saying to me? You're saying just exactly what Liberty Valance said. What kind of community have I come to? You all seem to know about Liberty Valance. He's a no good, gun-packing, murdering thief. But the only advice you can give to me is to carry a gun. Well I'm a lawyer! Ransom Stoddard, Attorney at Law, and the law is the only . . . , the only . . .<sup>225</sup>

Stoddard is unable to tell us what the law is because he collapses again in mid-sentence. Just as in the first scene, Stoddard's self-identification as a lawyer carries an implicit, though as of yet illusory, assertion of authority and power.

After failing to get help from the town Marshall, the buffoonish Link Appleyard (Andy Devine), Stoddard decides that he will have to do something about Valance himself, in the meantime taking a job as a waiter at Pete's restaurant, under Hallie's tutelage.<sup>226</sup> Early in the film Stoddard is portrayed as powerless, soft and

221. ANDERSON, *supra* note 213, at 181.

222. As Post notes, this opposition continues to be a contradiction at the heart of our culture and is expressed in our ambivalence toward lawyers. "The lawyer is the public and unavoidable embodiment of the tension we all experience between the desire for an embracing and common community and the urge toward individual independence and self-assertion . . ." Post, *supra* note 18, at 389.

223. ANDERSON, *supra* note 213, at 181.

224. THE MAN WHO SHOT LIBERTY VALANCE, *supra* note 206.

225. *Id.*

226. "The ineffectual forces of law and order in *Liberty Valance* are burlesqued through the character of Marshall Link Appleyard, an obese coward delightfully played as a Shakespearean fool by Ford regular Andy Devine . . . [fulfilling] his duties as town marshal by cowering behind doorways to avoid Liberty Valance." MCBRIDE, *supra* note 208, at 629.

feminized. His feminization is reinforced by the full-length apron he wears much of the time, not only while he is working at the restaurant, but even, for some reason, on the dusty streets of Shinbone. In another confrontation between Valance and Stoddard at the restaurant, Valance laughs menacingly at Stoddard, saying "Well, lookie at the new *waitress*,"<sup>227</sup> and trips Stoddard, sending him and a tray of food sprawling to the floor. The deeply masculine Doniphon again intervenes as the only check on Valance's unbridled power within the town.<sup>228</sup> The three men each appear to represent different types of power and authority, each corresponding to different stages of civilization. Valance's power is primitive and uncontrolled. Doniphon's power is also dependant on the gun and private violence, but is executed through a romantic individualistic code of moral maturity and integrity.<sup>229</sup> If Valance is the boy, Doniphon is the man. Stoddard's power, as yet unrealized, is based on books, on codes of written law and on a violence that has been turned over to the state. Stoddard is the woman. The implicit suggestion is that one of the costs of book law is the emasculation of men.

Now a romantic view of a prior quasi-legal order is not necessarily oppositional. There is certainly a strain of nostalgic individualism and machismo to the depreciation of law this posture entails. But Ford doesn't end the story there. He makes both the costs and benefits of "progress" feel real and immediate. As the film progresses, so do Stoddard's character and stature, and so does the town. Stoddard next takes on the role (still a traditionally feminine one) of the new schoolteacher in the community, where he not only teaches old and young to read and to speak grammatically, but also emphasizes civics and democracy. In this environment he is confident and sure. Stoddard's civics lessons are soon put to the test, however: a statehood vote by the residents of the territory is imminent. And although a majority of the residents, including the farmers and townspeople of Shinbone, are supportive of statehood and the civilizing impact it would bring to their lives, the ranchers are adverse to statehood and anything else that would limit the "open range."<sup>230</sup> The ranchers hire Valance to kill several farmers and intimidate the residents of Shinbone into voting against statehood, and Doniphon returns to town to mount a defense. He bursts into school to gather the grown men. Class is quickly dismissed and Hallie, who had become Stoddard's prize pupil and assistant teacher, stands sadly by Stoddard as he erases the phrase "Education is the basis of law and order" from the blackboard. Seeing her disappointment and bitter

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227. THE MAN WHO SHOT LIBERTY VALANCE, *supra* note 206.

228. As if to emphasize Stoddard's impotence, Doniphon says as Valance leaves, "Now I wonder what scared him off." *Id.* Duncan Peabody, the town's newspaper editor, pats Stoddard on the shoulder and finishes the thought: "You know what scared him? The spectacle of law and order here rising up out of the gravy and mashed potatoes." *Id.*

229. As one critic notes, however, Doniphon's stature in the town is just as dependent on its relative lawlessness and individualized power as Valance's. Once Valance is killed, the "only world in which [Doniphon] can exist, the world of the gun rather than the book" is destroyed. MCBRIDE, *supra* note 208, at 633.

230. In a later speech, Stoddard notes that the people of Shinbone want statehood because "statehood means the protection of our farms and fences, and it means schools for our children, and it means progress for the future." THE MAN WHO SHOT LIBERTY VALANCE, *supra* note 206.



himself, he says, "You heard what Tom said, when force threatens, talk's no good anymore!"<sup>231</sup>

But force and talk are both far from done. They continue to battle it out in the movie, as do the concepts of liberty and collective governance, competing desires at the heart of legal ideology. At the town meeting to elect delegates to the statehood convention, Doniphon orchestrates Stoddard's nomination. Stoddard first nominates Doniphon, the town's true leader and the only logical candidate, but Tom refuses the nomination saying that he has "other plans, personal plans, Mr. Attorney."<sup>232</sup> The reference is to his plans to marry Hallie, but the explanation is unconvincing. His real motivation is far more complex. The suggestion is that his reluctance is based at least partially on his own ambivalence to the idea of statehood—its impact on the community and his status in it, a status based primarily on his role as a counterbalance to the constant threat posed by Valance. The audience senses that Doniphon understands that he belongs, just as Valance does, to a dying order. States don't need cowboys to deal with people like Valance, they need lawyers. And Doniphon knows as well as Valance that he has just as much to lose from "progress."<sup>233</sup>

Once Stoddard is elected as delegate, he and Doniphon are immediately confronted by Valance who again pits force against talk:

That vote don't mean a thing. Now you stay out of this, Doniphon, he's been hiding behind your gun long enough. You got a choice, *dishwasher*. Either you get out of town or tonight you be out on that street alone. You be there. And don't make us come and get you.<sup>234</sup>

Stoddard considers leaving town until he finds his friend Peabody's newspaper office ransacked and Peabody beaten almost to death by Liberty Valance. That night, wearing his apron and carrying the gun Doniphon gave him, Stoddard goes to meet Valance out on the street for a duel which stands to be little more than an execution. Indeed, Valance taunts and toys with Stoddard, shooting the gun out of his right hand—only to have Stoddard retrieve the gun and somehow kill Valance with a left-handed shot.

This mysterious duel is the fulcrum of the film, the point at which the fortunes of Stoddard and Doniphon and the structure of frontier life all change direction. It is the beginning of Doniphon's decline and Stoddard's ascendancy. Stoddard stumbles back to the restaurant where Hallie cleans his wounds and gazes at him with a new sense of respect and affection. After Doniphon walks in on Stoddard and Hallie in an affectionate embrace, he goes to burn down the house he has been building for Hallie, almost killing himself in the process. Stoddard, on the other hand, travels to Capitol City as a delegate to the statehood convention, where he is nominated by Peabody as a delegate to Congress. Peabody offers an intriguingly

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231. *Id.*

232. *Id.*

233. As Eyman points out, Doniphon "knows that, on some level, when he kills Valance, he is killing himself." EYMAN, *supra* note 212, at 491.

234. THE MAN WHO SHOT LIBERTY VALANCE, *supra* note 206.

complex argument for Stoddard's qualifications. Discussing the bold pioneers who settled the West, he notes that:

The boldest of these were the cattlemen who seized the wide-open range for their own domain, and their law was the law of the hired gun. But now, today, come the railroad and the people, the steady, hardworking citizens . . . We need statehood to protect the rights of every man and woman however humble. And how do we get it? I'll tell you how. We get it by placing our votes behind one man. And we have that man with us here. He is man who came to us not packing a gun, but carrying instead a bag of . . . *law books*. Yes, he is a lawyer and a teacher . . . but more important, he has come to be known through this territory over the past few weeks as a great champion of law and order.<sup>235</sup>

Stoddard is mortified both by his nomination and its justification. The reason that he is now famous as a champion of law and order and viable as a candidate is because he has become known as the man who shot Liberty Valance. Stoddard is disgusted at the irony: he came to Shinbone to bring law and order, and yet his single dramatic unlawful act is what brought order to Shinbone and made him their legal hero.<sup>236</sup> Indeed, the irony is still richer when the opponents of statehood rise to oppose Stoddard's nomination. These proponents of force argue against Stoddard precisely because he used force rather than the mechanisms of law to take down Valance. Major Cassius Starbuckle asks the assembly: "Is it possible that such a representative body of honest, hard-working Americans can endorse a candidate for the Congress of our own beloved country whose only claim to the office is that he killed a man?"<sup>237</sup> Stoddard, who can no longer stand the shame, leaves the assembly room, vowing to return to the East where he belongs.

As Stoddard leaves, he finds Doniphon waiting for him in the hall. Doniphon wants to know why he is leaving: "Valance couldn't make you run away. What is it now, Pilgrim? Your conscience?"<sup>238</sup> Stoddard's response is anguished, "Isn't it enough to kill a man without trying to build a life on it?!"<sup>239</sup> Doniphon then reveals to Stoddard (and the audience) that he wasn't actually the man who killed Liberty Valance. Through a flashback within the flashback, we see as the ever-present Doniphon shoots Valance from a hidden vantage on the other side of the street. Much as Doniphon orchestrated Stoddard's nomination to the convention, he also seems to have engineered Stoddard's newfound reputation as a man of action. Finally, by telling Stoddard the truth he allows Stoddard to live with the reputation by assuring him that it was falsely earned. Perhaps most surprising is

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235. *Id.*

236. See Post, *supra* note 18, at 382-83 (describing how in both *The Man Who Shot Liberty Valance* and *The Talk of the Town*, upright lawyers must learn to act lawlessly in order to uphold another kind of law, which is in the interest of justice and the integrity of the community).

237. THE MAN WHO SHOT LIBERTY VALANCE, *supra* note 206. Starbuckle continues:

Who is this Ransom Stoddard, and what qualifications has he that entitle him to aspire to such high office? We are told that he is a lawyer, and attorney at law. An officer of the court. Yes, but what kind of lawyer? A man who usurps function of both judge and jury and takes the law into his own hands. . . . Is this your fearless champion of law and order? *Id.*

238. *Id.*

239. *Id.*

that Stoddard, the man of principle, is willing to take credit for killing Liberty Valance and build a career on it, but only if he didn't really do it. He can build his life on a lie, but not on an act of lawlessness.<sup>240</sup> The change has come, the rules are different now, but Ford refuses to let either the old rules or new feel natural and right.

Stoddard accepts the nomination, marries Hallie, and is elected to Congress. He goes on to become Governor, then Senator and it is suggested that he may become the Vice Presidential candidate; over the course of the next few decades he brings Shinbone and the entire state the benefits of civilization that he had so naively dreamed of bringing as a young man, including legal institutions and the justice they protect. During the same period, Doniphon's stature collapses; he becomes long-forgotten in the town he once protected single-handedly and dies a drunken vagrant. Doniphon's death is what has brought them back to Shinbone after so many years and this is where Stoddard concludes the story he is telling the newspaper reporter at the beginning of the film. He and Hallie board the train back to Washington. The train conductor tells them about the special arrangements that have been made for their return trip. Stoddard thanks him, and the conductor replies, "Nothing's too good for the man who shot Liberty Valance."<sup>241</sup> Stoddard has just told the journalist the true story, but the legend lives on.<sup>242</sup>

The final shot of the film shows the train arcing away into the distance, visually defying a more linear narrative of progress. The mood is sad and ambivalent. It is neither nostalgic for the past nor satisfied with the present, leaving the audience with nothing more concrete than the fact of history itself.<sup>243</sup> It was the prophetic Doniphon who called Stoddard "Pilgrim," and he is a pilgrim of sorts. And like the Pilgrims before him, Stoddard brought destruction along with progress. Ford seems to suggest that, seen through the wide lens of history, Stoddard's success in civilizing the frontier is a hollow victory, for he has simply replaced one kind of civilization with another, one legal order with another. The strong message of this heartbreaking story is that loss, costs and contradiction always lay at the heart of

240. In his essay on the film, Cheyney Ryan argues that this perpetuated misidentification of the man who actually shot Liberty Valance is what makes the movie about ideology, "in the sense that Louis Althusser used the term—a structure of misrecognition that necessarily animates the interactions and unfolding of an ordered community." Cheyney Ryan, *Print the Legend: Violence and Recognition in The Man Who Shot Liberty Valance*, in *LEGAL REELISM*, *supra* note 81, at 23, 23.

241. *THE MAN WHO SHOT LIBERTY VALANCE*, *supra* note 206.

242. As Scott Eyman notes in his biography of Ford:

In *The Searchers*, as well as *Liberty Valance*, the kind of men needed to master the wilderness are the kind of men that can only function in wilderness; they are men who civilization must expel. If society is to benefit from someone's sacrifice, legend must take precedence over truth. Ford may celebrate America's history and values, but he also articulates the contradictions that can easily lead to a mournful pessimism. Ford is too complex an artist to assert that the modern world is a 180-degree betrayal of the past; rather, he believes that history is organic and the present is the logical extension of the past.

EYMAN, *supra* note 212, at 492.

243. "There is no doubt where Ford's sympathies lie—a man is entitled to his feelings—but his judgment is another thing. And in the end both feelings and judgments must yield to the inevitability of history." ANDERSON, *supra* note 213, at 182.

progress.<sup>244</sup> The values of civilization as we know it and book law as we practice it are called into question without recourse to the comforts of nostalgia. One of the costs of the turn to book law is some forms of justice. And unlike most popular depictions of law, even those where law constrains justice, we do not have a comforting sense of who the hero is. In one sense *The Man Who Shot Liberty Valance* is the story of the advent of modern justice, and Lindsay Anderson's assessment describes both the story and its subject: "The hero does not win. The winner is not heroic."<sup>245</sup> By siding with neither liberty nor collective governance, the film embraces two of the most incompatible strains within legal ideology.

Ford's is an especially dark, poetic perspective that refuses the dominant ideology of law and justice. While relatively rare, his position is far from unique in popular film. The theme of the costs and impotence of law and its inability to achieve consistent justice is evident in a broad range of popular films by American, Canadian and Australian filmmakers which achieved commercial and critical success in the United States. Whether an early John Ford film like *The Grapes of Wrath* or a Frank Capra film of the same era, *Mr. Smith Goes to Washington*, mainstream directors working in the studio system have portrayed government, governmental institutions and public officials as venal, corrupt and hostile to justice.<sup>246</sup> Post-Code era films like Francis Ford Coppola's *The Godfather* trilogy are even more pointed, depicting the limitations of the American justice system, born of prejudice against and disregard for recent immigrants, and the violent lawlessness that such limitations produce.<sup>247</sup> The *Godfather* movies, much like Fritz Lang's *M*,<sup>248</sup> went so far as to equate the practices of the powerful in the criminal world with their counterparts in "lawful" society. Like Ford, Coppola consciously encoded his films to highlight the moral opaqueness of law by showing the equivalencies between law and lawlessness,<sup>249</sup> as both directors make vivid, some forms of lawlessness are not anarchic, but simply different systems with different rules and codes of behavior. More recent films like Bruce Beresford's

244. Discussing the central theme of *Valance*, McBride notes that:

Ford makes a film with a populist thrust but an ultimate skepticism about the value of 'progress.' In terms of psychohistory, the killing of Valence, a rampant Western id-figure . . . means the purging of the unbridled force of the libido from the frontier town of Shinbone, leaving in its wake Tom's coffin, the feeble old Pompey, and the desiccated Stoddard couple. The wilderness may have become a garden, but it has become poisoned at its heart. Ford strikes this theme from the opening shot of the train bearing the Stoddards back to Shinbone: as the train leaves the frame, Ford lingers a moment on its black smoke hovering over the otherwise pristine landscape, visually showing that 'progress' is a polluting force.

MCBRIDE, *supra* note 208, at 632.

245. ANDERSON, *supra* note 213, at 178.

246. *THE GRAPES OF WRATH* (20th Century Fox 1940); *MR. SMITH GOES TO WASHINGTON* (Columbia Pictures 1939).

247. *THE GODFATHER* (Paramount Pictures 1972); *THE GODFATHER: PART II* (Paramount Pictures and The Coppola Company 1974); *THE GODFATHER: PART III* (Paramount Pictures and Zoetrope Studios 1990).

248. See *supra* note 173.

249. As noted above, the *Godfather* films tended to be consistently decoded by audiences in much more conventional ways than Coppola had intended. See *supra* note 81.

*Breaker Morant*<sup>250</sup> highlight the use of legal structures to circumvent both law and justice in the service of other imperatives. In *Breaker*, three Australian soldiers who followed unjust orders are court marshaled. In the interests of larger political objectives, these soldiers are sacrificed to protect the truly guilty parties – the ones who gave the orders. And, in a twist on the same basic theme in Barry Levinson's *Sleepers*<sup>251</sup> legal institutions are consciously and carefully perverted to exact righteous revenge.

Canadian filmmaker Atom Egoyan's film adaptation of Russell Banks' novel *The Sweet Hereafter*<sup>252</sup> tells a contemporary version of the same story about the human costs of law and its distance from justice. In Egoyan's film, a small town in Canada tries to recover from, and find justice after, a horrible school bus accident which kills and injures several local children. Here, law is depicted not merely as incapable of achieving justice, but as the primary barrier to its attainment. When attorney Mitchell Stevens (Ian Holm) comes to town to gather clients for a lawsuit against the deep-pocketed corporations possibly responsible for the accident, many of the bereaved parents are initially wary of the attorney, but some sign on after he assures them that he has been retained not to help their grief but "to give your anger a voice, to be your weapon against whoever caused that bus to go off the road."<sup>253</sup> After discussing the futility of suing the penniless bus driver, Stevens is asked by his potential clients if he thinks that someone other than the bus driver caused the accident. He responds:

There is no such thing as an accident. The word doesn't mean anything to me. As far as I'm concerned somebody, somewhere made a decision to cut a corner. Some corrupt agency or corporation accounted the cost variance between a ten-cent bolt and a million dollar out of court settlement. And they decided to sacrifice a few lives for the difference. . . . Somebody calculated ahead of time what it would cost to sacrifice safety. . . . And now, it's up to me to ensure moral responsibility in this society.<sup>254</sup>

Although slightly overstated, even coming from a personal injury attorney, the lawyer here expresses one established view of the role that lawyers play in promoting legal justice. He is promising to use the legal system both to compensate the families for their loss, to punish those legally and morally responsible for the "accident" and to make it less likely that such a tragedy will occur in the future. For most of the potential plaintiffs, and one must assume for most of the film's audience, these goals of compensation and deterrence are both valid in the abstract and compelling in many particular cases.

The central dramatic theme of the film is a challenge, subtle at first and then increasingly stark and direct, to the veracity of this accepted notion of the role of the law. In part it is a challenge to the role and motivations of the attorney. We are given the clear impression that Stevens is less than completely sincere, that he will

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250. *BREAKER MORANT* (New World 1980).

251. *SLEEPERS* (Warner Brothers 1996).

252. *THE SWEET HEREAFTER* (Fine Line 1997).

253. *Id.*

254. *Id.*

contour his message of what law has to offer—financial gain, punishment or deterrence—in order to increase the number of plaintiffs and his fee. The lawyer as an amoral social leech is certainly at least as common an image in American film as the lawyer as a knight in shining armor, and this film plays to that baser view.<sup>255</sup>

The more basic attack of the film is less focused on the role of lawyers, however, but instead questions the fundamental ability of the law to solve problems or compensate victims. Like *The Man Who Shot Liberty Valance*, *The Sweet Hereafter* is mournfully attentive to the human costs of law. Overlaid onto the central storyline of the film is a recitation of the classic poem "The Pied Piper of Hamelin," by Robert Browning, about a man who rids a town of a plague of rats by leading them away with his magic flute. Egoyan, however, focuses on the more sinister and cautionary aspect of the poem: when the leaders of the town, who offer to pay the Pied Piper handsomely for his services, fail to do so, he responds by magically extracting their children in the same way he led away the rats, leading them to a hidden cave from which they will never return. One moral of the poem, and one of the central themes of the movie, is that the means we choose to solve a problem might, even if completely successful, produce far graver consequences. In *The Sweet Hereafter*, the children of the town have already been taken away, and the focus is on the choices the people of the town make afterward and the costs of choosing law.

Among the costs to the town of using law to respond to the pain and anger of losing their children are dissent, bitterness and a loss of community. Billy Ansell is a potential plaintiff in the lawsuit; having lost two children and witnessed the bus accident personally, he would likely have the most lucrative claim. But his character is the one who most passionately expresses the limitations and costs inherent in a legal response to the losses shared by the community. Ironically, he is also the one who exacerbates the community conflict posed by the lawsuit when he condemns those who choose to sue. In one encounter with Stevens, the attorney tells him "I can help you," and he bitterly responds, "Not unless you can raise the dead."<sup>256</sup> Ansell is furious with Stevens' divisive presence in the town: threatening him with violence and warning him away. "You leave us alone, Stevens. You leave the people of this town alone. You can't help."<sup>257</sup>

Although the movie plays off certain strains of the common anti-lawyer and anti-tort themes that are abundant in American popular and corporate discourse, it is far more subtle and philosophical than those traditional diatribes would suggest. Ansell sees Stevens as an agent of harm, not because he is a lawyer per se, but because Ansell senses the ways in which law simply can't fix the problems the town has—the problems of grief and pain—and how law, by attempting to bring some responsible party to justice, can inflict a greater injustice, which for Ansell is

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255. See, e.g., Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185 (1987); Richard K. Sherwin, *Picturing Justice: Images of Law & Lawyers in the Visual Media*, 30 U.S.F. L. REV. 891 (1996); Thom Weidlich, *A Cynical Age Sees Few Heroes in its Lawyers*, NAT'L. L.J. (Nov. 29, 1993).

256. THE SWEET HEREAFTER, *supra* note 252.

257. *Id.*

loss of community. The gap between what the law can provide in the form of either compensation or comfort and what a united community can provide is the real focus of Ansell's dramatic disgust. To demonstrate the power of community over conflict and to try and dissuade one family from joining the lawsuit, Ansell offers the father of a girl permanently paralyzed in the accident the insurance award he received for the loss of his two children to help pay for the girl's medical bills. Ansell reminds him, "that's what we used to do, remember? Help each other. 'Cus this was a community."<sup>258</sup> Moved partly by these sentiments and partly by a complicated and sexually abusive relationship with her father, a child, the paralyzed girl herself and Steven's star witness, decides to lie in her deposition by placing the entire blame for the accident on the bus driver—whose liability had already been compensated—in order to effectively kill the lawsuit.

The notion of community expressed by Billy Ansell's character in *The Sweet Hereafter* is deeply nostalgic and idealized, and while it is not the only account of community in the film,<sup>259</sup> it works very well as a vehicle for portraying some of the costs of law. In this instance, the legal response to the tragedy that the entire town has experienced, the high stakes personal injury lawsuit, supplants more traditional responses that the community would have relied on in a less legally sophisticated time. While the law provides numerous options that were unavailable before, such as access to financial resources, punishment for blameworthy behavior and disincentives for future bad acts, it does so at a heavy price. By identifying the victims and separating them from the blameworthy, by calculating the monetary worth of incalculable loss, and by creating new sources of conflict, the lawsuit, even if successful, can destroy the very community it should benefit. Like the town in Browning's poem that lost its children as the price for ridding itself of an infestation, this town could lose its cohesiveness and identity as the price for compensating parents for the loss of their children.

*The Sweet Hereafter* is a film about a lawsuit that bypasses the most common images and issues of law-related films: it ignores the questions of who is really culpable and where legal blame should be placed. There is no climatic courtroom confrontation, and even the lawyer is portrayed as fundamentally human rather than professional.<sup>260</sup> The "legal" resolution of the story is distinctly beside the point. Much like *The Man Who Shot Liberty Valance* and the Browning poem, this film is also a parable about loss; law is portrayed as one possible response to tragedy and loss, a response that carries some serious, often hidden costs which may overwhelm its capacity for creating value and promoting justice.<sup>261</sup> But, as challenging as *The*

258. *Id.*

259. Communities not only bind people together and give them an identity and a home, but to do so they create boundaries and rules of membership which are exclusionary as well. As the more submerged plotline about sexual abuse demonstrates, communities, by silencing dissent, help privatize and perpetuate deeper injustices.

260. Alexander Scherr & Hillary Farber, *Popular Culture as a Lens on Legal Professionalism*, 55 S.C. L. REV. 351, 364 (2003) ("author, director, and actor go beyond the stereotype by depicting the lawyer as a complex person with multiple motivations").

261. See, e.g., Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in the*

*Sweet Hereafter* is to the concept of reliable legal justice, it is equally and deeply grounded in the kind of hegemonic truth about where justice lies—here most evident in the nostalgic and common sense observations of Billy Ansell—that defined popular understanding for many in the Birmingham School.<sup>262</sup> As we discuss in more detail in the following section, the relatively common message that law is unreliable at attaining justice depends on an accepted notion of justice that both the producers and consumers of popular culture can be counted on to share. And while films about law can be read against the grain of their encoded messages by various kinds of audiences, the presence and tenacity of this accepted sense of justice is the ideology-supporting core of even some of the most challenging and oppositional images of law in popular culture.

### b. *The Verdict and the Role of the Lawyer*

One of the most common and accessible of all popular film formats is the courtroom drama. This genre has been highly successful at conveying accessible legal conflict and resolution to a wide and varied audience. A surprising number of these film narratives, however, provide dark, complex and occasionally disturbing pictures of the role of the lawyer, and frequently of the law itself. Even when justice is realized, it is often realized in spite of lawyers and the law. While films like *Erin Brockovich*,<sup>263</sup> *Anatomy of a Murder*, *To Kill a Mockingbird*, . . . *And Justice for All*,<sup>264</sup> *Class Action*, *A Civil Action*<sup>265</sup> and even *Liar Liar*,<sup>266</sup> among many others, all depict the potential of law and legal institutions to produce unjust results, no modern American film provides a more challenging and subtle image of the role of lawyers in the promotion of justice and injustice than the 1982 film *The Verdict*.<sup>267</sup> And no film relies more effectively on a hegemonic, common sense

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*Sweet Hereafter*, 34 L. & SOC'Y REV. 3 (2000) (exploring the ways in which themes of loss and tropes of fatherhood are used in the film to capture our collective fantasies and anxieties about the law).

262. See *supra* notes 61-67 and accompanying text (discussing hegemony and the Birmingham centre).

263. ERIN BROCKOVICH (Universal Pictures 2000).

264. . . . AND JUSTICE FOR ALL (Columbia Pictures 1979).

265. A CIVIL ACTION (Buena Vista 1998).

266. LIAR LIAR (Universal Pictures 1997).

267. THE VERDICT (20th Century Fox 1982). Not surprisingly, a good deal has been written about *The Verdict* in the legal literature in the last few years alone, although for the most part these articles do not engage the movie so much as reference it as illustrative of a legal problem or of the popular perception of lawyers and law practice. See, e.g., Edward L. Rubin, *Trial By Battle. Trial By Argument*, 56 ARK. L. REV. 261 (2003) (referencing *The Verdict* as an example of trials by argument); Scherr & Farber, *supra* note 218 (discussing how the complexities of Galvin's character can help law students understand the challenges of the profession); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001) (arguing that trial films like *The Verdict* help create the popular misconception that jury trials are the norm); Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339 (2001) (calling *The Verdict* a landmark film in its portrayal of big law firms); David M. Spitz, *Heroes or Villains? Moral Struggles vs. Ethical Dilemmas: An Examination of Dramatic Portrayals of Lawyers and the Legal Profession in Popular Culture*, 24 NOVA L. REV. 725 (2000) (suggesting that Galvin's unethical behavior contributes to the popular distaste of attorneys); Marianne M. Jennings, *Moral Disengagement and Lawyers: Codes,*



understanding of justice to demonstrate both law's inherent weaknesses and its role as the foundation of justice in our society. Like so many other courtroom dramas, *The Verdict* is not easily read as ideologically oppositional; against all odds justice wins out in the end. It is, however, ideologically complex in the sense that there is an explicit critique of law and lawyers, and that critique depends on a clear and shared moral economy and legal legitimacy—for the most part we know who the good guys and bad guys are, and we know we need law, however flawed.

The film overtly critiques power and the ways in which the most powerful social institutions, like the law, the church and the medical profession—*The Verdict* implicates all of these—have enormous effects on the ordinary people who are dependant on their services. The film suggests that the powerless feel their dependence and constraint even when lawyers, clergy and doctors act in good faith, but that too often those with power act out of self-interest, greed, and the desire for more power. This line of argument represents the film's most ideologically oppositional strain in that it goes to the heart of power relations and the oppressive effects of power. But to the extent this argument relies on a critique of law's ability to do justice, it is undone by the film's semi-triumphant end.

What makes *The Verdict* even more interesting is that the main character, attorney Frank Galvin (Paul Newman) defies moral categorization. He is selfish, desperate, flawed and willing to act illegally, but he is also portrayed as having deep integrity, compassion and commitment to justice. Directed by Sidney Lumet, from a screenplay by David Mamet (adapted from the novel by Boston attorney Barry Reed), *The Verdict* is the story of Galvin's attempt to rebuild his life and his career by trying a medical malpractice case. As the film begins, Galvin is at the very bottom, personally and professionally. The opening credits role over a shot of Galvin playing pinball in a bar at the crack of dawn, a mug of beer his only companion. We then see him slipping a ten dollar bill to an employee at a funeral home so that he can be introduced to bereaved family members in a desperate attempt to drum up business. Next we see Galvin consume a breakfast of powdered donuts and a shot of whiskey, which his hands are not even steady enough to raise to his mouth. At the next funeral home he is exposed and angrily ousted. Galvin pauses for moment after the rebuke, as if reminded of something that he has long since forgotten—the gap between the lawyer he aspired to be and what he has been reduced to.

Not long after Galvin ransacks his own already disheveled office in a drunken stupor, pulling his law school diploma from the wall and bashing it against his desk, his friend Mickey visits. This fellow attorney comes by the office to remind Galvin about the client he threw his way and the court date he has in less than two weeks. Galvin pulls himself together long enough to meet his clients in the exterior room to his destroyed office under the pretension that his secretary is at lunch and his office is full of papers for a big upcoming case. It is but the first of his many deceptive interactions with these clients. The clients, a young working-class

couple, tell their story: the wife's sister, Deborah Ann, was severely injured during childbirth, losing the baby and suffering severe brain damage. She is in a permanent vegetative state, and they are suing the doctors and the hospital that they believe are responsible. They need \$50,000 for permanent medical care and a bit more money so they can leave town in search of a better job for the husband. Galvin, without having ever seen their file, tells them that they have a great case, and that he doubts that the case will ever come to trial.

The owner of the hospital, the Catholic Archdiocese of Boston, schedules a meeting with Galvin to offer him a settlement. Galvin has by then met with an expert witness willing to testify that the attending physicians were seriously negligent in the case. He tells Galvin that it would be crazy to accept a settlement because the doctors "gave her the wrong anesthetic and she wound up drowning in her own vomit. The doctors murdered her."<sup>268</sup> Galvin is surprised by the willingness of this doctor to testify against the more famous defendants and the powerful church; Galvin asks him why he is doing it, to which the doctor responds: "To do the right thing. Isn't that why you're doing it?"<sup>269</sup> He considers this question and we see on his face a familiar searching look as if he is trying to recall a former self, one who would have taken this case for reasons other than the possibility of a quick settlement.

It seems that some of Galvin's long-dormant idealism is beginning to reawaken. This case against a Catholic hospital just may be Galvin's salvation. Before keeping his appointment at the Archdiocese, Galvin stops by the hospital where Deborah Ann is cared for. He stands by her bedside taking Polaroid shots of her, and as the pictures gradually develop before his eyes, we see a gradual change in Galvin before ours. He sits down, brow furrowed, again as if there is something he is trying to remember. When a nurse tells him that he is not allowed to be in this ward, he looks down and replies, almost shamefully, "I'm her attorney."<sup>270</sup>

At the meeting, the Archdiocese offers a good settlement of \$210,000 and the expected disclaimers. But Galvin's response to the offer is unexpected. He notes how neatly the figure can be divided into thirds to accommodate his one-third contingency fee. And Galvin laments that accepting the settlement will prevent the "truth" about what happened to his client from being uncovered. The Archbishop asks rhetorically and provocatively, "What is the truth?"<sup>271</sup> But Galvin responds sincerely:

That that poor girl put her trust in the, the hands of two men who took her life. She's in a coma. Her life is gone. She has no home, no family. She's tied to a machine. She has no friends. And the people who should care for her: her doctors, and you and me, have been bought off to look the other way . . . I came here to take your money. I brought snap shots to show you so I could get your money. I can't do it, I can't take it. Because if I take the money I'm lost. I'll just be a rich ambulance chaser. I can't

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268. THE VERDICT, *supra* note 267.

269. *Id.*

270. *Id.*

271. *Id.*

do it. I can't take it.<sup>272</sup>

This is Galvin's first classically heroic moment in the film, and it feels heroic precisely because the movie has made it clear and the audience fully accepts that Galvin's client has been the victim of human wrongdoing. And yet, while the audience can take comfort in the film's general moral coherence, it cannot feel confident in Galvin's heroism. The film is complex exactly in its refusal to let the heroic moment be. At the same time that Galvin manages to rise above his apparent weaknesses, malaise and venality, to commit himself to fight for justice, he also violates some of the most basic ethical principles that govern the behavior of lawyers. First, he rejects a settlement that would have provided his clients with far more money than they sought as compensation, and worse yet, he does so without even bothering to check with them. And second, he acts in his own interests rather than the interests of his clients. He appears to reject the settlement for reasons that have everything to do with reviving his own lost idealism, his self-respect and his failing career.

When he tells his colleague Mickey that he has turned down the settlement offer, Mickey thinks he is out of his mind. Galvin says, "They killed her, and they're trying to buy it," to which Mickey responds, "That's the fucking point, Dummy. Let them buy it."<sup>273</sup> But Galvin is undaunted, indeed he is energized, and is beginning to look like a new man, or perhaps like the man he has been trying to remember.

In the courthouse, after having withstood the pressure from the presiding judge to settle the case, Galvin runs into the all but forgotten clients who have been told by the other side that he rejected the settlement. The mood changes abruptly. The angry husband confronts Galvin:

You said that you were gonna call me up. You didn't call me up. Who do you think you are? Who do you think you are? Huh? They tell me I can have you disbarred. . . . Do you know what you did? I said do you know what you did?! You ruined my life, Mister. Me and my wife. And now I'm gonna ruin yours. You don't have to go out there to see that girl. We've been going for four years now. . . . I am a working man and I am trying to get my wife out of town. Now we hired you and I am paying you and I have to find out from the other side that they offered \$200,000? You guys. You guys are all the same. The doctors at the hospital, you, it's always what I'm going to do for you. And then you screw up. And its, uh, "We did the best that we could, I'm dreadfully sorry." And people like us live with your mistakes the rest of our lives.<sup>274</sup>

Alongside the redemption of Galvin, this desperate oration by a powerless man at the mercy of power is the other central theme of the film. The speech belies any sense that Galvin acted triumphantly or heroically by rejecting the settlement offer, and it also contributes to a larger critique of the classic movie moment when the desire for truth wins out over the desire for money, and the lawyer heroically

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272. *Id.*

273. *Id.*

274. *Id.*

rejects the settlement in the interests of true justice. *The Verdict* invites the viewer to question the implicit triumph of that moment by suggesting that sometimes money is more valuable than truth, and justice ought to be determined by the needs of the less powerful rather than the needs of power. The same plaintive plea of "who do you think you are" is a refrain throughout the story, addressed to all the holders of power and influence in this narrative: the lawyers and the judge, the doctors and the clergymen. The film ably portrays what the client observes and feels, that people like him, the working class and the poor, are the victims of power rather than its beneficiaries. The law for these people does not offer opportunities for redemption, as it does for Galvin, but slim hope and dependence.

The case begins to unravel for Galvin when he finds out that his star expert witness has abruptly left the country, bound for a resort that one of the defense lawyers had been planning to visit before the trial date was set. The strong implication is that the defendant's legal team, unconstrained by ethics or professionalism, has used its impressive money and muscle to get rid of the witness who was the key to the plaintiff's entire case. Galvin must ask the judge, whom he has recently insulted, for a continuance, and the judge refuses, making it clear that his refusal is based on personal pique rather than legal justification.

It is at this point in the story that we hear exactly how Galvin fell from the heights of a once stellar legal career. Early in his career at a high profile law firm, Galvin discovered that one of the name partners had bribed a juror in an important trial. Galvin was devastated. His friend Mickey recalls Galvin's crushed idealism:

Frankie heard about that, he came to me in tears. He figured that anyone who knew what a spinnaker was had to be a saint. I said, 'For Chissakes, Frankie, wake up. These people are sharks. How the hell do you think they wound up with all that God damn money, from doing good?'<sup>275</sup>

At the time, Galvin didn't heed Mickey's advice and instead told the firm that he was going to tell the judge what happened. But before he could do it, the firm pinned the jury tampering on Galvin and had him arrested on felony charges. Galvin finally gave up, and sought forgiveness from the firm, which dropped the charges and then fired him on the spot.

Again, Galvin's idealism and unwillingness to act as a "normal" lawyer would act get him into trouble. In *The Verdict*, the "normal" lawyer is unconstrained by conviction, loyalty, morality or justice. And yet it is perhaps the singular accomplishment of the film that Galvin's refusal to fall in line as a lawyer by disdaining the rules does not render him heroic. By the time we hear this story we know enough about Galvin to know he is not always noble. Despite the way the film resists heroism, it certainly succumbs to rather clichéd lawyer bashing. The obvious suggestion is that the legal profession is thoroughly corrupt. We are reminded again and again that lawyers do not become wealthy and powerful by helping the weak or serving justice. They become rich and powerful by using their position, their skill and their influence any way they can, within the law and/or

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275. *Id.*

outside it if necessary, to ensure their continued wealth and privilege. The defense firm not only sends away Galvin's star witness, but even more stunningly it employs a woman to attract, distract and spy on Galvin so it always knows what his strategy is. The spy becomes remorseful and the partner in charge of the defense consoles her with a speech that expresses this devastating view of lawyers:

I know how you feel. You don't believe me, but I do know. I'm going to tell you something that I learned when I was your age. I prepared a case, and old man White said to me, 'How did you do?' And I said, 'I did my best.' And he said, 'You're not paid to do your best, you're paid to win.' And that's what pays for this office. Pays for the pro bono work that we do for the poor. Pays for the type of law that you want to practice. Pays for my whiskey. Pays for your clothes. Pays for the leisure we have to sit back and discuss philosophy as we are doing tonight. We are paid to *win the case*.<sup>276</sup>

Faced with a missing witness and a judge who won't change the trial date, Galvin is again forced to surrender, as he did in the jury tampering incident. He calls the Archdiocese's counsel and begs to accept the settlement offer which has now been withdrawn. But settlement is no longer an option. After a near nervous breakdown, Galvin finally pulls himself together and tracks down a replacement expert witness, a two-bit elderly doctor (the fact that he is an African American doctor for a Boston trial only adds to Galvin's woes), and starts his trial.<sup>277</sup> The trial is a dark comedy about the legal professional: the judge, whose personal animosity towards Galvin had only grown during the course of the trial, personally examines Galvin's expert witness with disbelief and hostility; Galvin chastises the judge in open court and again in chambers; then Galvin returns to botch the cross-examination of the treating physician.

Beyond desperate, Galvin breaks a number of laws in an attempt to find the one witness who might provide a chance to win the case—the former admitting nurse at the hospital. After breaking into a mailbox, impersonating a magazine salesman on the phone, and just for good measure lying to a nurse in Catholic chapel, he finds the former nurse, who has fled to New York. She is reluctant to return and testify to the fact that Deborah Ann had eaten one hour before being admitted, that she had written that down on the form, and that after the accident the doctors forced her to change the admittance form by threatening to prevent her from ever working in a hospital again. But she does return, and in dramatic and unimpeachable testimony, the former nurse not only tells her story, but produces a copy of the original admittance form to dispute the altered version which had been entered into evidence by the defense. Her anguished testimony reasserts the central theme of the story, the utter lack of regard that those in power have for the powerless and the

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276. *Id.*

277. When an associate from the defendant's firm smugly tells the partner in charge of the case that the expert witness that Galvin has been forced to fall back on is black, the partner, in the most somber and serious of tones, mildly rebukes the younger lawyer: "I'll tell you how you handle the fact that he is black. You don't touch it. You don't mention it. You treat him just like anybody else. Neither better nor worse. And, um, let's have a black lawyer sit at our table, okay." *Id.*

myriad ways that their acts of selfishness wreak havoc in the lives of those less powerful.<sup>278</sup>

After the operation, when that poor girl, she went into a coma, Dr. Towler called me in. He told me that he had five difficult deliveries in a row and he was tired and he never looked at the admittance form. And he told me to change the form. He told me to change the one to a nine or else, or else he said, he said he'd fire me. He said I'd never work again. Who were these men? Who were these men?! I wanted to be a nurse!<sup>279</sup>

The film's dire vision of the relationship between lawyers, the legal system and the promotion of justice is exemplified not by this dramatic revelation, but by what follows. The defendant's counsel makes a clever and technical legal argument—that the photocopy of the original admittance form should not be allowed as evidence given the existence of the actual original, albeit potentially falsified. Moreover, the attorney argues that since the only evidentiary basis for the nurse's testimony is the photocopy, her entire testimony should be stricken and that the jury should be instructed to disregard totally the centrally relevant information she has provided. The judge accepts both arguments over Galvin's objection and instructs the jury in the sternest possible terms to disregard everything that the nurse has said.

The substantive evidentiary decision is presented as a reasonable and defensible application of existing law. Galvin's objections seem obligatory and rote, and the judge's demeanor does not betray the bias evident earlier in the trial. Unlike the instances of trial error or misconduct depicted in many other films, such as . . . *And Justice for All*, *To Kill a Mockingbird* and *Breaker Morant*, where injustice results from the failure to follow the clear precepts of the law, here it is apparently the standard application of the law that produces injustice. Ideologically this is far more damning—legal rules rather than human bias are responsible for unjust results. And yet, as is almost invariably true in popular cultural depictions of legal disputes, there is no doubt where justice lies. In contrast to all the interpretive room available for decoding this movie, the moral demarcations are abundantly clear; we know the doctors are guilty, the lawyers act in bad faith, and law stands in the way of the plaintiff's relief.

Seemingly defeated, with no admissible evidence to provide the basis for a jury verdict in his clients' favor, Galvin focuses in his closing statement on the reality of what has happened in the courtroom, and on the gap that exists in this case between law and justice. He observes that law by its nature is merely a rough guide for producing justice, and that it should never be mistaken for justice itself. In a stunning and succinct argument, he asks the jury to believe what they have seen, to trust *their own ability* to understand what is just, and to abandon the law in their

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278. Here she echoes the statements of her friend who had tried to keep Galvin off her trail, and who, in talking about both the doctors and the lawyers, said, "You know, you guys are all the same. You don't care who ya hurt. All you care about is a dollar. You're a bunch of whores. You've got no loyalty. No nothing. You're a bunch of whores." *Id.*

279. *Id.*

pursuit of justice:

You know, so much of the time we're just lost. We say please, God, tell us what is right, tell us what is true. There is no justice. The rich win, the poor are powerless. We become tired of hearing people lie, and after a time we become dead—a little dead. . . . We doubt ourselves, we doubt our beliefs. We doubt our institutions. And we doubt the law. But today, you are the law. You *are* the law. Not some book. Not the lawyers. Not a marble statue, or the trappings of the court. See, those are just symbols of our desire to be just. They are, they are in fact, a prayer—a fervent and a frightened prayer. In my religion, they say act as if ye had faith, faith will be given to you. If? If we are to have faith in justice we need only to believe in ourselves and act with justice. See, I believe there is justice in our hearts.<sup>280</sup>

Not surprisingly the camera stays motionless in the jury box during his speech, putting the audience in the position of the jury. Galvin's words resonate because they appeal to a shared sense of right, a shared sense of powerlessness and a shared suspicion that the institutions that are meant to protect us really oppress us. But for all its populist resistance, Galvin's speech doesn't ask the jury to break the law or even to ignore it, but to become it and create it. The end is not a rejection of law as much as a triumph of its authority. After reading the verdict in favor of the plaintiffs, the jury foreman asks the judge "are we limited to the size of the award . . . are we permitted to award an amount greater than the amount the plaintiff asked for?"<sup>281</sup>

Although the outcome is different from what legal rules would provide for, the alternative is still legally produced justice, and the conclusion is not only comforting, but authoritative. The law already makes room for common-sense understandings of justice by non-lawyers; that is the heart of the jury system and the acknowledged ability of juries to nullify the legal rules through which they are supposed to judge the case. Thus, although severely and relentlessly critical of the role of the law and the lawyer in the promotion of justice and the oppression of the powerless, *The Verdict* nonetheless relies on a notion of transparent and transcendent justice which is ideologically reinforcing. And through recourse to this sense of justice, the law, even when it is not legitimate, still has the capacity to be authoritative. In this way, *The Verdict* and similar films support the dominant ideological view of law, but in a manner that is far darker and more complex than almost anything available on television.

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280. *Id.* In a speech earlier in the film, Galvin discusses the role that the jury plays in the justice system in a similar vein: "The weak. The weak have gotta have somebody to fight for 'em. Ain't that the truth? . . . See, that's why the court exists. The court doesn't exist to give 'em justice. The court exists to give 'em a chance at justice. . . . See, the jury wants to believe. I mean, the jury *wants* to believe. It is something to see. . . . All of them, for all their lives: 'It's a sham, it's rigged, you can't fight City Hall.' But when they step into that jury box, you just barely see it in their eyes. Maybe, maybe . . . maybe I can do something right." *Id.*

281. *Id.*

c. Cool Hand Luke and the Outlaw Genre

The ubiquitous outlaw movie is one of the most consistent places in popular culture where the dissonance between law and justice in American society is narrated, and for this reason these narrations tend to be ideologically complex and challenging. There are so many of these movies that they fall into a number of categories within the genre. There is the less remarkable variety featuring stories of wrongly-accused criminals, like *The Fugitive*, *Presumed Innocent*,<sup>282</sup> *Nuts*,<sup>283</sup> *To Kill a Mockingbird* and *Mr. Deeds Goes to Town*.<sup>284</sup> Then there are those that portray criminals not as heroes, but in an undeniably attractive light, like *The Godfather* trilogy, *Bonnie and Clyde*,<sup>285</sup> *The Silence of the Lambs*,<sup>286</sup> *Reservoir Dogs*,<sup>287</sup> and even *Young Guns*,<sup>288</sup> to name just a few. And finally there are the scores of films produced by Hollywood studios in the past half century which depict rightly-accused criminals as exceptionally heroic and law-enforcement as impenetrably evil. These inverted morality tales, where the law-breaker is far more valorous than those responsible for law-enforcement, enjoy a central role in the popular film panoply.

Even within the category of outlaw-as-hero films, there is abundant variation. There are prison films, like *I am a Fugitive from a Chain Gang*, *Birdman of Alcatraz*,<sup>289</sup> *Escape from Alcatraz*,<sup>290</sup> *Brubaker*,<sup>291</sup> *One Flew Over the Cuckoo's Nest*,<sup>292</sup> and *The Shawshank Redemption*,<sup>293</sup> which all feature intelligent, affable and valorous criminals tormented by venal, cowardly, vain, and sadistic prison officials. There are prison escape films, such as *The Defiant Ones*,<sup>294</sup> *O Brother, Where Art Thou*,<sup>295</sup> *Out of Sight*,<sup>296</sup> and, to a lesser extent, *Stalag 17*,<sup>297</sup> and *The Great Escape*,<sup>298</sup> in which the sheer determination, ingenuity and will of the escapees cast a heroic light on the outlaws. And perhaps the classics of the genre are the Western and the modern criminal caper film like *Butch Cassidy and the Sundance Kid*,<sup>299</sup> *The Sting*,<sup>300</sup> *The Lady Killers*,<sup>301</sup> *The Grifters*,<sup>302</sup> *Ocean's 11*,<sup>303</sup> and *The Italian*

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282. PRESUMED INNOCENT (Warner Brothers 1990).

283. NUTS (Warner Brothers 1987).

284. MR. DEEDS GOES TO TOWN (Columbia Pictures 1936).

285. BONNIE AND CLYDE (Warner Brothers 1967).

286. THE SILENCE OF THE LAMBS (Orion Pictures 1991).

287. RESERVOIR DOGS (Miramax 1992).

288. YOUNG GUNS (20th Century Fox 1988).

289. BIRDMAN OF ALCATRAZ (United Artists 1962).

290. ESCAPE FROM ALCATRAZ (Paramount Pictures 1979).

291. BRUBAKER (20th Century Fox 1980).

292. ONE FLEW OVER THE CUCKOO'S NEST (United Artists 1975).

293. THE SHAWSHANK REDEMPTION (Castle Rock Entertainment and Columbia Pictures Corporation 1994).

294. THE DEFIANT ONES (United Artists 1958).

295. O BROTHER, WHERE ART THOU (Buena Vista Pictures 2000).

296. OUT OF SIGHT (Universal Pictures 1998).

297. STALAG 17 (Paramount Pictures 1953).

298. THE GREAT ESCAPE (United Artists 1963).

299. BUTCH CASSIDY AND THE SUNDANCE KID (20th Century Fox 1969).

300. THE STING (Universal Pictures 1973).



*Job*.<sup>304</sup> While many aspects of these outlaw movies can be subtle and ambiguous, the moral line separating the heroic characters from the malevolent ones is clear and unmistakable. The twist in these films is that even though their moral compass is almost always sure, they invert the conventional moral hierarchy. The result is occasionally a profound anti-authoritarian message.

Among the most interesting and dense films of this genre, along with *Cuckoo's Nest* (which is based on a critically important literary text) and *I am a Fugitive from a Chain Gang* (which was released in 1932), is *Cool Hand Luke*, a 1967 film directed by Stuart Rosenberg and starring Paul Newman in the title role.<sup>305</sup> It was written by Donn Pearce, a convicted felon and a former member of a Southern chain-gang. While its moral clarity might suggest ideological complexity, its characterization of law and legal authority as irretrievably illegitimate, evil and soul-killing suggests otherwise—that this a film which positions itself in opposition to any dominant ideology of law.

The first shot is a close-up of the window of an expired parking meter. The red "Violation" indicator fills the screen. In the next shot a drunken Luke is using an odd tool to cut the heads off the meters. He seems completely uninterested in extracting the coins from the meter heads that have dropped to the street and indeed, he appears not only inebriated but delighted by his own antics. This is an amusing activity for someone with an odd sense of humor; he even affectionately kisses the face of one of the meters before proceeding to cut it off.<sup>306</sup> The police arrive and we next see Luke being deposited with a prison chain gang. It is immediately clear that the rules of the chain gang are minute and exactly enforced: the prisoners are obligated to ask permission from the guards to perform the most basic acts—taking off their shirt, wiping their face, taking a drink of water—and are chastised for simply looking a guard in the eye. The prison guards are epitomized by their chief, Godfrey, who never says a word but wields enormous and ferocious power. We never see Godfrey's eyes, which are perpetually shielded behind the lenses of his mirrored sunglasses, but his face is impassive. Justice is blind, but injustice sees all without being seen.

It is not long before we learn that Luke, who has been convicted of "maliciously destroying municipal property while under the influence," is a war hero with the remarkable distinction of having earned four medals for valor in combat while still failing to earn a single promotion during his service. He is an unapologetic rebel, an almost compulsive nonconformist with an innate disdain for authority and power. And it is precisely Luke's refusal to submit to authority that makes him heroic within the film. His heroism is matched and made possible by the cruelty of the guards.

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301. THE LADY KILLERS (Continental Distributing 1955).

302. THE GRIFTERS (Miramax 1990).

303. OCEAN'S 11 (Warner Brothers 2001).

304. THE ITALIAN JOB (Paramount Pictures 2003).

305. COOL HAND LUKE (Warner Brothers 1967).

306. Later in the film when asked to explain why he would do something like that, Luke responds: "You know how it is. Small town, not much to do in the evening. Mostly just settling an old score." *Id.*

Once in the barracks, Luke and the other new prisoners are taught an extensive set of rules—and the dreaded punishment for their violation—spending a night in the box, a small, dark, poorly ventilated shack barely large enough to hold a grown man.<sup>307</sup> Luke's immediate contempt for the rules leads the floor walker to warn, "I hope you're not gonna be a hard case."<sup>308</sup> At dinner Luke learns another set of rules imposed by the prisoners themselves. There are special seats, special names and other special requirements applicable to all the prisoners and to the new entrants in particular. Luke refers to the apparent leader of the prisoners, who informs the newcomers of these rules, as "Boss," which is the same name used for the prison guards. The way the prisoners imitate and even assist their guards by imposing more rules is not lost on a natural rule-breaker like Luke. Later, when the prisoners play a trick on one of the new inmates, and as a result he is confined to the box for the night, they try to absolve themselves from responsibility for this excessive punishment. One of them says, "He ain't in the box because of the joke played on him. He backasssed a free man. They got their rules; we ain't got nothing to do with that."<sup>309</sup> Luke's response is sarcastic and disdainful: "Yeah, those poor old bosses need all the help they can get."<sup>310</sup>

The conflict between Luke and the lead prisoner, Dragline, continues to grow, and the two finally meet in an officially sanctioned boxing match in the prison courtyard. Outmatched and battered, Luke refuses to give up and submit to the imposition of Dragline's authority. As the fight begins, the inmates root for Dragline, but their sympathies change as they watch Luke refuse to give up; he takes a horrible beating and keeps coming back for more. They beg Luke to stop, and Dragline tells him, "Stay down, you're beat." But Luke responds, "You're gonna have to kill me."<sup>311</sup> The guards, who had been ignoring the fight, and indeed, probably welcomed the help knocking the cocky new inmate down a few pegs, finally take notice. They understand the danger posed by a prisoner willing to withstand so much to avoid surrendering to authority. What makes Luke a threat to the guards is also what makes him heroic to the other prisoners. Luke's efforts even win over Dragline himself, who stops his assault, picks Luke up and carries him into the barracks.

Luke's inevitable clash with the true authority in the prison comes after he gets word that his mother has died, and the prison warden confines him to the box in order to prevent him from trying to escape to attend her funeral. As one of the sympathetic guards leads him to the tiny cell and locks him in, he apologizes: "Sorry, Luke, I'm just doing my job, you've got to appreciate that." Luke responds, "Calling it your job don't make it right, Boss."<sup>312</sup> The guard himself

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307. The rules include remembering the laundry number, using and not losing dinner spoons, no ass-grabbing, being in your bunk by lights out, no smoking in the bunk, no sitting in bunk with dirty pants on, no loud talking and having to bring pop bottle back. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

implicitly acknowledges the inherent injustice of both punishing Luke before he has even escaped and preventing him from attending the funeral of his mother in the first place (a right, the film strongly suggests, even a prison inmate should not be deprived of). And, as with the images of justice that permeate *The Verdict*, this film is encoded so that Luke's own sense of right and wrong is naturalized, making him seem both sympathetic and heroic in his extreme resistance to the injustices of authority.

It is not until Luke returns to the barracks that we realize how profound, and in some ways irrational, his defiance is. Despite the fact that he is serving a relatively light sentence, will soon be released, and his mother's funeral is over, he nonetheless saws a hole in the floor and escapes. He is captured within a day or two, but escapes again immediately, this time avoiding capture for weeks. The other inmates' admiration for Luke has only grown since the fight with Dragline, particularly after his bold and ingenious escapes. But Luke attains legendary status when he mails a magazine to Dragline into which he has inserted a picture of himself flanked by two glamorous women. His defiant attitude and his successful thwarting of authority provide the other inmates with the hope they too can escape, both physically and emotionally, from their bondage. Indeed, there is something about Luke and his physical freedom that seems to infuse many of the prisoners with a limited but cherished emotional freedom. Everything he has ever done suggests that he would rather die than submit to any authority. And as long as he can show courage and defiance in the face of the powerful forces that control their lives, there is a chance that they could do the same.

Luke is finally captured and returned a second time, and he suffers the full wrath of the prison officials. After the exceptionally torturous punishment designed to put Luke's "mind right,"<sup>313</sup> he surrenders, begs for forgiveness and impresses the guards with his sincerity and his willingness to call on God—the ultimate authority figure—for help. He returns to the barracks and to the inmates who are visibly crestfallen, betrayed by their hero. But their admiration returns when immediately after returning to the chain gang Luke escapes an improbable third time. Dragline, who escapes with him this time, commends him for fooling the guards about his conversion, and Luke corrects him: "You can't fool them about something like that. They broke me."<sup>314</sup>

Dragline wants them to "shake the world"<sup>315</sup> together, but Luke is a solo artist and they go their separate ways. Luke comes across a chapel, and takes the opportunity for an extended discussion with God:

Hey old man, you home tonight? Can you spare a minute? It's about time we had a little talk. I know I'm a pretty evil fella. Killed people in the war, I got drunk and chewed up municipal property and the like. . . . It's beginning to look like you got things fixed so I can never win out. Inside, outside, all those rules, and regulations and bosses. You made me like I am. So just where am I supposed to fit in? . . . I

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313. *Id.*

314. *Id.*

315. *Id.*

guess I'm pretty tough to deal with. A hard case? Yeah. I guess I got to find my own way.<sup>316</sup>

Soon after this speech, the guards close in on the chapel and Luke is killed by an unprovoked gunshot from Godfrey. Instead of being taken to a hospital, he is brought back to the prison where he is allowed to die. But an untimely and unjust death only enhances his legendary status among the other inmates. The film ends with the prisoners gathering around Dragline as he tells them what Luke looked like when he was taken away. Dragline recounts that Luke's eyes were open and he was smiling in the same way that he always did; and this is only a partial lie—his eyes were closed, but indeed, on Luke's face was his unmistakable, bemused smile. The final shot, which confirms the similarities between Luke's story and that of Christ, superimposes the photograph that Luke had once sent Dragline, with his arms outstretched to embrace two women, over the scene of the chain gang working at an intersection. The camera pans up as if his beautiful companions are angels taking Luke off the "cross" that was his earthly existence and which the intersection so clearly resembles.

*Cool Hand Luke* is one of many popular culture texts which find inspiration and thematic structure in the Christ story, but few films or literary texts provide such a clear and unapologetic retelling of the story of the outlaw hero who inspires his followers even after his death.<sup>317</sup> The Christ story readily lends itself to outlaw narratives with its application of unjust legal authority against the innocent and with the opportunity for redemption it offers the powerless. Jack Miles' recent study of Jesus in the *New Testament*, helps explain the lure of the Christ myth for artists and audiences generally, as well as the surfeit of popular culture stories that focus on the nobility of the criminal more specifically:

Winners usually look like winners, and losers like losers. But thanks to this paradoxical feature of the Christian myth, there remains lodged deep in the political consciousness of the West a readiness to believe that the apparent loser may be the real winner unrecognized . . . . One of many implications of this epilogue to God's life story has been that in the West no regime can declare itself above review. All power is conditional; and when the powerless rise, God may be with them. The motif of divinity in disguise is not unique to Christianity; but the Christian motif of unrecognized divinity judicially tried, official condemned, tortured by his captors, executed in public, buried, and only then rising from the dead and ascending into heaven is, if not literally unique, then at least unique in the breadth of its political influence. . . . In the West, any criminal may be Christ, and therefore any prosecutor Pilate.<sup>318</sup>

It is interesting that popular culture's stories of heroic criminals are usually

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316. *Id.*

317. See, e.g., ERNEST HEMINGWAY, *OLD MAN AND THE SEA* (1995); KEN KESSEY, *ONE FLEW OVER THE CUCKOO'S NEST* (1989); *MATRIX* (Warner Studios 1999); C.S. LEWIS, *THE LION, THE WITCH AND THE WARDROBE* (1987) (and its sequels), (as well as the play and film based on the novel); JOHN STEINBECK, *THE GRAPES OF WRATH* (2002); FRITZ LANG, *METROPOLIS* (1982); J.R.R. TOLKIEN, *THE LORD OF THE RINGS*; and *THE LORD OF THE RINGS* (New Line 2001).

318. JACK MILES, *CHRIST: A CRISIS IN THE LIFE OF GOD 4* (2002).

inverted morality tales. In some sense they are a rejection of the dominant legal ideology: they usually make law and its enforcement appear illegitimate or immoral, they valorize rejection of legal authority and social conformity and they applaud rebellion and resistance. But they are morality tales just the same, and their allusion to the Christ story reinforces their sense of righteousness and moral clarity. In this sense these outlaw narratives are part of the complex hegemonic ideology production the British cultural studies scholars identified. These tales use the Christ myth to help naturalize a particular moral and social order. Although the Christ story justifies the rejection of legal and political authority when it runs contrary to this moral order, it also models a belief in moral clarity and a particularly passive form of rebellion that leaves vindication for the afterlife.

Christ imagery, even the relatively obvious allusions in *Cool Hand Luke*, is also an example of the complexity of encoding popular texts and the many possible decodings that popular audience can produce. The stories depicted in *Cool Hand Luke*, or *One Flew Over the Cuckoo's Nest* or *On the Waterfront*<sup>319</sup> for that matter, may be encoded by their producers with a particular Christ theme, but the meanings derived and decoded by the audience may vary considerably. Indeed, the more complex the message, the more various the interpretations. Thus, viewers may focus on the sense of redemptive sacrifice, the pathos of the story, the injustice, the rebellion, or none of these. Or viewers may see all of these and still not connect them to the Christ myth. One of the characteristic features of popular culture, and film in particular, is the availability of an abundant variety of readings of the same text from an array of audience members. It is one of the main reasons that there is the potential for both crudely ideological and oppositional readings within the same medium, and indeed, within the same text.

### C. MAKING SENSE OF THE DIFFERENCES BETWEEN TELEVISION & FILM

So what might be the explanation for the substantial difference in the ideological content between the two dominant popular culture media, film and television? Television, in particular network television, while similar in many important ways to the popular film medium (the two are, indeed, becoming less and less distinguishable over time), has some defining characteristics which help explain the almost exclusive presence of the most crudely ideological legal programming.<sup>320</sup> The way that companies that produce and profit from broadcast network television shows and the "episodic" nature of the network television series both work to restrict the kinds of legal images that television might otherwise depict.

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319. ON THE WATERFRONT (Columbia Pictures 1954).

320. Television networks are paying more and more money to showcase recent blockbuster films in an effort to boost sagging ratings. Claudia Eller & Brian Lowry, *Fox, Turner Team up to Reel in Spider-Man*, L.A. TIMES, June 1, 2002, at C3 (noting Fox paid an estimated \$60 million to air *Spider-Man*, and ABC received much criticism for the high price it paid, nearly \$140 million, for the rights to *Harry Potter* and its first sequel). This merger of film and television will only increase with the "vertical integration" of network television and major film studios. See *infra* notes 325-45 and accompanying text.

## 1. Profit and Production Structure

Movie producers, movies studios, and the giant corporations that own studios make their money based on a complex but definable business model. According to a recent calculation in a film trade publication, the largest portion of world-wide film profits for the major studios in the United States<sup>321</sup> comes from sales and rental of video cassettes and disks (forty-three percent), followed by televising fees paid by network television (twenty-nine percent), revenue from theatrical release (eighteen percent), and revenues (either in fees or subscription payments) from pay cable (eleven percent).<sup>322</sup> Revenues from home video and theatrical release rose faster between 2001 and 2002 (up thirty-one percent and eighteen percent respectively) than the other components. Of the \$37.3 billion in revenue the major studios accumulated in 2002, fifty-three percent came from domestic profits and forty-seven percent from overseas.<sup>323</sup>

As these figures demonstrate, there are inextricable connections between the film and television industries that resist assertions of drastic distinctions at the level of profit and production. But while a significant portion of film profits come from domestic network television fees, the vast majority, even of the "major studio" profits, come from other distribution streams. And none of these streams rely to the extent that network television does on the central profit engine of that medium—advertising.

Studios do not solicit advertisers to support their movies in the same way that television stations do. They certainly receive substantial revenue from advertising in or during their films in the form of product placement; that revenue is used to offset the direct costs of films and is therefore figured into the "theatrical release" profits detailed above.<sup>324</sup> However, the revenues from product placements remain a small portion of the overall profits obtained from commercial filmmaking. Moreover, as product placements are designed to blend into films, they provide an inherently different advertising atmosphere than that of network T.V. The largest percentage

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321. As of the time of publication of this article, the major "Hollywood" studios included Disney, Sony, MGM, Paramount, 20<sup>th</sup> Century Fox, Universal Studios, and Warner Bros. In a sense, the description of these companies as "U.S." studios is more than a little misleading, as all of these are either vast international conglomerates, or are owned by conglomerates, and some (like Sony and Universal) are no longer based in the United States at all.

322. HY Hollinger, *MPAA reports robust '02 earnings*, HOLLYWOOD REPORTER, April 15-21, 2003, at 10.

323. *Id.*

324. See Marc Graser, *Land that Brand*, DAILY VARIETY, Nov. 15, 2002, at 1 (discussing how major film studios use product placement as a means to offset production costs). As production costs increase, recent films have featured an increased number of brand name products. Jane Weaver, *A License to Shill*, MSNBC NEWS (June 16, 2003), at <http://msnbc.com/news/833973.asp?0cb=-51619238> (describing *Die Another Day* as a marketing blitz, with MGM enlisting more than 20 marketing partners contributing at least \$100 million, \$35 million of which came from Ford Motor Company alone). See also Marc Graser, *Strike up the Brand*, DAILY VARIETY, June 21, 2002, at 1 (noting the extensive use of product placement in *Minority Report*, which earned the studio \$25 million towards its budget). The real benefit of product placement is for the advertisers themselves in having their brand associated with a blockbuster hit. Weaver, *supra* note 324, at <http://msnbc.com/news/907161.asp>.

of studio profits—more than sixty percent—comes from theater ticket sales and video rentals and sales. From the perspective of pure profit generation, therefore, movie producers main concern is simply enticing as many consumers as possible to the theater or video store. There is little financial incentive for a film producer or distributor to avoid challenging or disturbing subject matter as long as the film can find an audience large enough to provide a sufficient return on investment. And, if one assumes that some audiences will find that challenging images resonate with their own perspective and experience, there may be profit-based incentives to produce films which are ideologically complex or even subversive.

This is not to say that a studio, like Disney for example, is completely neutral as to the content of its releases, or oblivious to the negative impact that movies with certain kinds of themes might have on its much larger corporate/consumer empire, as the studio's recent treatment of Michael Moore's documentary *Fahrenheit 9/11* demonstrates.<sup>325</sup> But studios, even (maybe particularly) Disney, diffuse the potential negative impact to their invaluable brand names by having various subsidiaries and distribution arms (Touchstone and Miramax studios, and Buena Vista distribution, among others, for Disney) which leave all but the most savvy industry observers clueless as to the identity of the specific corporate giants who have bankrolled the latest teen slasher flick or other lucrative but embarrassing title. The point is that while there may be various overt and subtle incentives for major studios to produce films which conform to a cruder ideological model, the studio profit structure provides significant limits on the direct financial incentives for them to do so.

It is also important to note that while the major studios dominate the popular film industry in this country, there is an impressive variety of filmmakers and film production enterprises which play a significant role in the development of American popular culture. This variety, which involves a wide range of business plans, profit expectations, and artistic motivations, results in an even wider range of content than could be expected from the major corporate studios. The production and distribution model of the purely "independent" film—which for years served as an alternative means of providing the limited financing necessary to make relatively inexpensive films that could make a profit with relatively small audiences—has been complicated recently by the emergence of corporate competitors, like Miramax, FineLine, Fox Searchlight and Sony Classics, for the kind of films that once defined the independent film genre and by the impact of large, nationally prominent (and corporately financed) independent film festivals.<sup>326</sup> Nonetheless, there are still scores of films released every year which are made outside the studio structure and which provide noticeably unorthodox subject matter. Again, the ability of Michael Moore to find an alternative distributor for his quasi-independent film *Fahrenheit 9/11*, which became the highest grossing documentary in American film history, demonstrates this

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325. See *supra* note 205.

326. For a full discussion of the modern independent film industry see PETER BISKIND, *DOWN AND DIRTY PICTURES: MIRAMAX, SUNDANCE AND THE RISE OF INDEPENDENT FILM* (2004).

dynamic.<sup>327</sup>

These independent films fit a relatively small, but nonetheless important niche in the popular film industry. While the screens of multiplexes in suburban and rural communities throughout the country are dominated by more mainstream studio fare, there are literally thousands of screens in urban areas in the US and abroad which all but exclusively show independent-style smaller films.<sup>328</sup> And while few of these movies ever approach the gross receipts of films that are shown on five or six thousand screens simultaneously,<sup>329</sup> many of them are profitable, and some remarkably so.<sup>330</sup> And since it takes a much smaller audience to support a profitable lower-budget release, these films often focus on a relatively small demographic within the urban population, and involve subject matter which may be of significant interest to people of color, immigrants, gays and lesbians, or other groups who are too small or whose tastes are too idiosyncratic to be served by the more mainstream releases.<sup>331</sup> Not surprisingly, therefore, the content and themes of independent movies provide a much broader spectrum of characters and issues than one finds from movies that cost \$150 million to make and must be viewed, in one form or another, by tens of millions of consumers to return a profit.<sup>332</sup>

327. See *supra* note 205.

328. The past two decades have seen the advent of "art house" and "specialty" theaters, particularly in large cities, both locally owned and nationally syndicated (such as the Landmark theater chain) which specialize in showing "smaller" films which are not generally available in large multiplexes. See, e.g., Anthony Breznician, *Gibson Passion to Debut Ash Wednesday*, LEXINGTON HERALD LEADER, Oct. 31, 2003, at 1 (Weekender).

329. Peter Callahan, *Don't Lose it at the Movies*, FORTUNE, Jan. 8, 2001, at 178 (stating that no more than one tenth of the 1,000 or so independent movies made each year turn a profit). See Sharon Waxman, *Small Films, Now Smaller than Ever*, WASH. POST, Nov. 20, 2000, at C1 (observing that few independent films are able to find an audience, due to the large number of independent films flooding the market).

330. Brian Fuson, *Big Finish: Box Office Posts Record Gains in a Super Year*, HOLLYWOOD REPORTER, Jan. 6, 2003, at 22 (distinguishing the independent film *My Big Fat Greek Wedding* as the highest-grossing independent film ever, and fifth highest-grossing film of 2002, with over \$200 million dollars in revenue). Prior to the release of *My Big Fat Greek Wedding*, the 1999 independent film *The Blair Witch Project* held the record, grossing over \$140 million in its release year. Brian Fuson, *Dragon Bites off \$37.5 mil Sets Record*, HOLLYWOOD REPORTER, Oct. 7, 2002, at 1.

331. See, e.g., *THE PASSION OF THE CHRIST* (Newmarket Films 2004); *FAHRENHEIT 9/11* (Miramax 2004); *REAL WOMEN HAVE CURVES* (HBO 2002); *KISSING JESSICA STEIN* (Fox Searchlight 2002); *WHALE RIDER* (Newmarket Films 2003); and *GARDEN STATE* (Miramax/Fox Searchlight 2004).

332. One filmmaker recently described the freedom that independent film production allows: "Very often, you'll see films achieve a distinguished level of box office, but so much money has been put into advertising to achieve that gross that the film is really awash in red ink; it is a false impression of success. They routinely have to cope with the fact that a \$20 million opening weekend is paltry, where for me, a \$20 million ultimate gross after months of release is a smash, one of the most successful independent films of the year." Scott Tobias, *Small Wonders: Tiny distribution houses are finding success through prudent spending, diversified revenue streams and a healthy sense of proportion*, HOLLYWOOD REPORTER, Aug. 1, 2004, at 32. This freedom allows filmmakers to address topics that are of primary interest to a smaller portion of the population, as the prevalence of independent films with gay and lesbian main characters demonstrates. See generally Amanda Schurr, *Sarasota Filmmaker Looks at Gay Life in Rural Surroundings* SARASOTA HERALD-TRIBUNE, Aug. 20, 2004, at 17 (describing the diverse themes and plotlines at the Sarasota Film Society's Gay & Lesbian Film Festival, including drama, documentary, comic mockumentary, a lesbian slasher sendup and a tongue-in-cheek



As the independent film dynamic demonstrates, the medium of film provides a large and substantively varied set of distribution options. Thousands of films are made in this country each year and shown to paying audiences throughout the world. In contrast, network television has only scores of slots available in the collective line ups each season, and a fair number of these are dedicated to news and sports programming. And with respect to financing and production as well, film provides far more opportunities than television. Although the majority of films are made through a predictable and highly structured corporate format, hundreds of others are products of individual filmmakers, or small groups of filmmakers or individuals financing small productions.<sup>333</sup> In contrast, television's financing and production structure doesn't allow as much access to independent television projects; to make it onto television they essentially have to be domesticated, sold to a network or cable channel and slotted into the competitive line-up.

The unique profit structure of network television, on the other hand, helps account for the fairly narrow ideological range in its legal programming. Perhaps the best explanation for why television is so consistently crude ideologically is that it is almost entirely dependant on corporate advertisers. Unlike film studios, who sell tickets and videos to individuals, networks primarily sell "tickets" to corporations. Indeed, to a great extent, the networks are selling these shows to only the largest and most powerful international corporations that can afford the increasingly expensive advertising fees in an increasingly competitive market.<sup>334</sup> The networks make money by producing and airing programming that is a good vehicle for advertising. One way to do this, of course, is to air programs that large numbers of people will watch. But the reality of the relationship between advertising and network television is more complicated than just ensuring that the greatest number of viewers are glued to a particular program. In order for advertising to be optimally successful, these viewers must be glued to the kind of programming which creates an atmosphere in which the advertisers' message will be advantageously conveyed. And in this day of market-driven product development, these advertising messages are much more sophisticated than the simple plea to "buy this widget."<sup>335</sup> Savvy advertisers, for example, will

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spy-chick flick). See, e.g., *SHE'S GOT TO HAVE IT* (Island Pictures 1986); *BOYZ IN THE HOOD* (Columbia/Tristar 1991); and *REAL WOMEN HAVE CURVES* (HBO 2002). These films demonstrate the possibility of making profitable films which are primarily intended for some identifiable portion of the broader film viewing audience.

333. Examples of artists who have succeeded in personally funding films include African-American writer/director Robert Townsend and his now famous credit-card scam that produced the independent hit *Hollywood Shuffle* (Conquering Unicorn) in the mid 1980's, and Spike Lee, who found funding for his Million Man March film, *Get on the Bus* (15 Black Men and 40 Acres & a Mule Filmworks), through direct appeals to prominent African-Americans like Oprah Winfrey, Bill Cosby, Michael Jordan and Magic Johnson. *My Big Fat Greek Wedding* (IFC Films) was made, in large part, from money contributed from a fan of the project, Tom Hanks' wife Rita Wilson.

334. As of May, 2003, seventy-five percent of all network advertising fees were paid by the top 100 international corporations. Louis H. Laphan, *The demonstration effect*, HARPER'S MAGAZINE, 2003, at 13.

335. Heidi Li Feldman, *Market-Driven Manufacturing and Its Challenges for Tort Law* (ms on

disassociate themselves from certain kinds of programming, even extremely popular programming, for fear that it could promote an image detrimental to the success of their product or service. The current wave of "reality" programming on the major networks, for example, seems to be in some jeopardy precisely because of the uneasiness that many advertisers are beginning to express about the influence that some of these shows may be having on viewers' attitudes towards their products.<sup>336</sup>

Mark Miller quotes one uncommonly candid assessment by an advertising executive who even in 1959 conveyed the importance of connecting advertising not just to a popular show, but to the right kind of popular show, and to avoiding studiously the wrong kind of show:

We know of no advertiser or advertising agency of any importance in this country who would knowingly allow the products which he is trying to advertise to the public to become associated with the squalor and general "down" character of *Street Scene*. On the contrary, it is general policy of advertisers to glamorize their products, the people who buy them, and the whole American social and economic scene.<sup>337</sup>

While the strategies of the advertising industry have certainly evolved over the past forty-five years, and the focus on certain specific niche audiences has lessened the concerns about the reactions of a "general" audience, advertisers still pay a great deal of attention to the kind of show that is appropriate as a platform for selling a specific kind of product.<sup>338</sup> It is natural and unavoidable that programming responds to these concerns.<sup>339</sup> In addition, the emergence of more

file with authors).

336. As Bill Carter writes:

Concerned that the content of its summer reality series, 'Big Brother 2' has become too sexually oriented to play in the early hour of 8 p.m., when more children are watching television, CBS announced yesterday that it would push the starting time of the show back to 9 p.m. The move comes as CBS copes with the defections of several advertisers from the series, though a CBS spokesman said the plan to move the show later is the evening was 'not a sales decision.' But one senior executive close to the CBS sales situation said, 'It's quite probable that advertisers who had a problem with the show at 8 p.m. may not have the same problems at 9 p.m.' . . . Reality shows, though they have performed exceptionally well in terms of ratings, especially among younger viewers, have always made a number of advertisers uncomfortable. A hit series on Fox during this past television season, *Temptation Island*, struggled to fill its commercial time with standard network advertisers and sold many commercials at bargain rates to sponsors like Slim Jim and David's Bridal Gowns.

Bill Carter, *The Media Business: Advertising; CBS hopes new slot for Big Brother 2 soothes sponsors*, N.Y. TIMES, Aug. 2, 2001, at C6

337. MILLER, *supra* note 89, at 13.

338. UPN, WB, and even Fox, have specialized in shows that are intended for only a portion of the audience at large.

339. In response to Proctor & Gamble's refusal to run ads during CBS's re-airing of a controversial episode of *Family Law*, the network pulled the show from the schedule. Lisa de Morales, *Change of Venue for Law*, WASH. POST, Aug. 18, 2001, at C1 (noting Proctor & Gamble as the series' biggest sponsor and a major advertiser for CBS). Another recent notable defection by advertisers was the 1997 coming-out episode on ABC's *Ellen* in which Jeep and J.C. Penney withdrew support. See *also id.* ("Among many examples of sponsor pullout: Back in 1989, advertisers bailed out of an episode of ABC's *thirtysomething* that depicted two gay men, propped up in bed, talking. In 1990, advertisers fled an episode of ABC's *China Beach* about abortion. Two years later, they deemed too hot to handle

daring programming on pay-cable channels like HBO ("The Sopranos," "Oz" and "Six Feet Under") and Showtime ("Queer as Folk") highlights the kinds of shows that are available to the networks but which they won't air, as well as the relative freedom that less direct reliance on advertisers can afford.<sup>340</sup> Nor is the influence of advertisers' preferences limited to entertainment programming. As a recent article by media columnist Lisa de Moraes attests, "more than half of [local] news directors interviewed said they'd been pressured by advertisers to kill negative stories—especially ones about their industries—and to run puff pieces about sponsors."<sup>341</sup>

Another thing that has changed since the 1950s is the form of corporate sponsorship. Early on in network programming, corporations would "buy" entire shows as sole sponsors and in many cases had direct control over the content of those shows.<sup>342</sup> One particularly dramatic example was *Judgment at Nuremberg*, a 1958 dramatization of the Nazi war-crime trials in which the phrase "gas chamber" was not allowed to be used due to the concerns of the program's sponsor, the American Gas Association.<sup>343</sup> This practice has changed so that now advertisers generally share sponsorship of programming by buying time slots. And while many sponsors still prescreen the shows on which their commercials appear, network executives deny that sponsor preferences affect the content of their programming, claiming that "advertisers' influence is limited to refusing to sponsor a show, which rarely, if ever, kills [it]."<sup>344</sup>

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an episode of NBC drama series *Quantum Leap* in which the lead character leapt back to 1964 and into the body of a Navy cadet trying to save a gay friend beaten by student vigilantes.").

340. John Dempsey, *It's Lonely at the Top*, VARIETY, Sept. 10-16, 2001, at 1 ("HBO basks in the kind of freedom that broadcast networks and basic-cable channels can only fantasize about. Because HBO is commercial-free, there are no advertisers threatening to pull their dollars from programs laced with disturbing content. And no conservative general managers of TV stations are shaking their spears, hell-bent on canceling a show that's too cutting-edge for their local communities."). See also Lisa de Moraes, *The Outer Limits: Gay TV Characters Break New Ground, Old Taboos*, WASH. POST, Mar. 3, 1999, at C1 (discussing the emergence of more gay characters on television, the article noted that more possibilities existed outside the network structure for shows with less routine formats. "But the networks shied away from taking gay mainstream because it cost a lot. Advertisers routinely 'punished' the networks for homosexual content by pulling ads . . . it was right up there on the no-no list with story lines about crimes against children. 'Advertisers were dealing in fear; they were making the assumption that it would drive audiences away,' [Warren Littlefield] explains.").

341. Lisa de Moraes, *There's Not Much News That's Good News*, WASH. POST, Nov. 16, 2001, at C7.

342. Peter Kerr, *Money Talks: More Influence for Corporate Sponsors*, SAN. FRAN. CHRONICLE, Aug. 4, 1985, at 53 (Datebook); Jan Norman, *Too Hot to Handle? Outraged Viewers Carry Protests to TV Program Advertisers*, ORANGE COUNTY REGISTER, Apr. 23, 1989 (on file with author) ("Protesters complain to advertisers in the belief they control program content as directly as they did in television's early years, when companies owned the programs, such as US Steel Hour or Hallmark Hall of Fame."); Wayne Friedman, *Fox's 'Shield' lures 11 new advertisers*, ADVERTISING AGE, April 15, 2002, at 6 ("Soon after its March 12 premiere, *The Shield* was hit with defections from major advertisers due to content concerns or pressure from TV viewer groups. New Balance, Office Depot, Diego's Burger King, along with Tricon Global Restaurants' KFC and Pizza Hut left the show after the premiere.").

343. Kerr, *supra* note 342, at 53.

344. Norman, *supra* note 342 (For example, Domino's decided to pull its commercials from a television episode in which a pizza delivery man was murdered).

In the mid-80s, a former head of programming at CBS claimed that advertisers exerted less influence on weekly programming than they had at any other time in broadcast history.<sup>345</sup> But there is evidence that since the deregulation of the late 1980s and 1990s, the trend is moving back in the direction of the 1950s. Indeed, deregulation has allowed major conglomerates like Viacom, Disney and Time Warner (who all also own major film studios) to buy up television networks and local stations throughout the country, resulting in unprecedented concentrations of media ownership.<sup>346</sup> While it seems clear that deregulation has "leash[ed] television content to the bottom line,"<sup>347</sup> many contend that the effect on content has become both more direct and less visible as the line between entertainment and advertising has essentially disintegrated.<sup>348</sup> Even those who do not dispute that entertainment television looks increasingly like infomercials, offer other explanations. One commentator suggests that "advertisers exert their real power not by overtly dictating content but rather by coopting professional standards."<sup>349</sup>

Whatever the explanation, there are numerous examples in various television genres of the influence of advertisers on content: the History Channel developed, but ultimately cancelled plans to run a documentary series about American companies in which each episode would be co-produced by the same companies featured in that episode;<sup>350</sup> CBS came up with "Liz Night" in which Elizabeth Taylor guest starred in four back-to-back sitcoms, all with an integrated plot line that dealt with "black pearls," not-so-coincidentally the name of her perfume marketed by Elizabeth Arden;<sup>351</sup> more recently, Cher appeared on an episode of NBC's "Will & Grace," in which a blunt plot device—the dream sequence—allowed her to sing pieces of two recently-released singles;<sup>352</sup> and increasingly, corporations are going back to sole sponsorship of specials and mini-series in which they can have more control, sometimes overseeing script development, casting and shooting.<sup>353</sup> Admittedly these examples merely provide circumstantial evidence of the very kind of influence that the network representatives expressly

345. Kerr, *supra* note 342, at 53.

346. See note 348, *infra* and accompanying text. See also John Carman, *Goliaths of TV Likely to Get Fatter: Ruling Good for Giant Firms*, SAN. FRAN. CHRONICLE, Feb. 21, 2002 at A1. Viacom owns CBS, Disney owns ABC, and General Electric owns NBC, and each owns extensive cable holdings and many other media venues. The result is that a few corporations own not only most of the mass media venues, such as TV, film, radio, books, magazines and newspapers, but they also own the delivery systems for those venues (networks, cable, satellite, etc.). William F. Baker, *Big Business is Devouring Television*, NEWSDAY, Mar. 13, 2002, at A33.

347. Baker, *supra* note 346, at A33.

348. Ronald K.L. Collins, *Tumble and Toss Goes Sponsor's Way: CBS and ABC Have Obliterated the Line Between Entertainment and Advertising*, L. A. TIMES, Mar. 3, 1996 at M5.

349. *Id.*

350. Steve Johnson, *Who's In Control? Questions Arise When Networks Crawl Into Bed with Sponsors*, CHI. TRIB., July 3, 1996, at 3.

351. Ronald K. L. Collins, *supra* note 348, at M5.

352. *Will & Grace: A. I.: Artificial Insemination* (NBC television broadcast, May 16, 2002). Nothing if not self-conscious, the show's writers even allude to the blatant promotion. After Cher begins singing again, Jack says, "Stop it! Stop it! You're hawking your album during my dream?!" And Cher says, "Well, somebody's gotta pay for the fog and the dancing fairies." *Id.*

353. Kerr, *supra* note 342, at 53.

deny, but as one television critic put it, "You have to wonder if spotting two programs that blur the lines between who controls content, programmer or advertiser, is like seeing a pair of cockroaches in the kitchen—a sign that there are a lot more of them lurking behind the stove."<sup>354</sup>

But as likely as it seems, conclusive proof that advertisers are asserting overt influence over the content of the programs they sponsor is not required to support our basic point, which is that the nature of the medium, and its profit and production structure, helps to explain the kind of legal content that is presented.<sup>355</sup> It is not an accident that images of the law and legal institutions would be overwhelmingly positive and reassuring in a medium so directly driven by advertising. While a show that regularly focused on corrupt, unpleasant, scurrilous and unjust legal professionals, or which suggested that the legal system infrequently produces just results, might garner significant viewership for a short period of time, the ambivalent and negative atmosphere it created would be inhospitable to advertisers and to the mood in which they like to communicate their messages. As noted earlier, corporate advertisers have every reason in the world to use their financial leverage to discourage television content that fosters social and political dissent and encourage content that fosters concern over social status. As Miller notes:

On TV, advertising streams along unmenaced by the sight of public suffering or material dilapidation, exhibiting itself in its own home—the viewer's home—buffered, like the viewer, against all the contrary evidence out in the streets and beyond. Whereas the ads must each stand out in order to succeed, advertising must not itself stand out, must not itself get caught in the glare of unexpected contrast . . . . What advertising needs is precisely what TV provides: a site secured against all threatening juxtaposition, so that, within it, the ads may proceed to juxtapose one high-contrast image with another, in order to offset the goods—the can of Pepsi in extreme close up . . . the tight Levi's, shapely denim on the tall girl leaning, braless and red-lipped, against a concrete wall in Nowhere City.<sup>356</sup>

While it may be somewhat simplistic to assume that products will be closely associated with the message or tone of the shows on which they are promoted, and that negative content can only hurt positive brand recognition, sales and profit, corporate advertisers tend to act as if it were so. In addition, Miller identifies a

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354. Johnson, *supra* note 350, at 3.

355. As Miller argues:

Within the culture of TV, however, there is no such easily legible intention, for the marketing imperative does not now originate within the midst of some purposeful elite, but resides in the very consciousness and day-to-day behavior of the media's general work force. Contrary to the dark guesswork of the vulgar Marxist, the TV newsman, for example, usually needs no guiding phone call from his higher-ups in order to decided the bias of his story, but will guide himself, as if on automatic, toward whatever formula might 'play,' i.e., fit TV's format, goose up the ratings, maintain (or boost) his salary . . . . The culture of TV goes on and on because it must go on and on. More disquieting even than the old nightmare of conspiracy is the likelihood that no conspiracy is needed.

MILLER, *supra* note 89, at 16-17.

356. *Id.* at 12-13.

more subtle influence that the advertising imperative has on the content of network television. According to Miller, the point of the shows is to provide a platform for the commercials, and while the shows must be sufficiently compelling to hold the viewers attention, they should not be too compelling or disturbing so as to make the platform more interesting than what it is there to highlight.<sup>357</sup> Under this theory, if network shows are to perform effectively their function, they will be only slightly sexier, funnier and more exciting versions of what the viewer is expecting to see. In the case of legally themed network television, this means lots of courtroom dramas with familiar camera angles and storylines (just sexy and violent enough), and with little suggestion that the legal institutions upon which the viewer vaguely and placidly relies are anything other than effective mechanisms for the production of a safe and just world. Such programming leaves viewers all but completely free to direct their concern at their own social status, which can only be raised by greater consumption.

## 2. Narrative Structure

In addition to the financial incentives of network television's advertising based profit system, the overwhelmingly preferred narrative device of network television—the series—provides additional motivation to present mainly positive images of the people and institutions featured in each show. With the exception of made-for-TV movies, the programming that television producers sell to networks is the television series, and they are paid either by the year or by the episode. Everyone's profits are enhanced the longer a series airs. First of all, the more episodes that air, the more lucrative the advertising revenue, and the more profits grow. Second, and more importantly, if a show lasts a certain amount of time (this time frame is ever-changing but most recently it is as little as three years), the show will be eligible for the syndication market which is exponentially more profitable than original runs.<sup>358</sup> The true bonanza for any television producer, the syndication market offers potential profits in the tens of millions for the more popular shows.<sup>359</sup>

Consequently, the central goal of television producers is to develop a show that will not only be picked up for one of the precious few slots on the network line up, but to produce a show that will last on that lineup for more than a couple of seasons. This imperative produces important limits on the kinds of content one sees on television series. Traditionally, television producers, with the aim of ensuring an extended network run, have sought to grab and hold audiences by filling their shows with characters that large portions of the target audience can identify or fall in love with, the hope being that over time viewers do not just like

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357. *Id.* at 19.

358. See Jonathan Taylor, *Television: Crossing the Comic Divide*, L.A. TIMES, Aug. 22, 2004, at E28.

359. See, e.g., Tom Shales, *A Big Hug Goodbye to Friends and maybe to the sit com*, WASH. POST, May 7, 2004, at C1 ("Even Oprah's fortune may look less preposterous in comparison to the profits from a hit sitcom that goes into perpetual syndication, as 'Friends'—like the far superior 'Seinfeld'—is likely to do.")

these characters, but develop a relationship with and a commitment to them.

The impact of this incentive on the content of legally themed network television is, again, what one might expect. As elaborated above, law shows on television tend to substitute character development for plot innovation. Each of the main law shows have had attractive principal characters who, while imbued with relatively interesting but standard foibles like alcohol or gambling problems ("Law and Order," "NYPD Blue"), infidelity ("The Practice," "LA Law"), and emotional immaturity ("Ally McBeal"), nevertheless have their hearts in the right place and are actually amazingly good at achieving just results. If the central characters of these shows were less successful or genuinely objectionable (if Sipowitz were actually hateful and sadistic as opposed to just gruff and lovable or if Jack McCoy got drunk on the job and sought to prosecute those he suspected were innocent) then one of the most effective means of garnering repeat viewers would be lost. In short, the series demands characters to which viewers want to return.

While brief storylines portraying fundamental flaws in the legal system might generate some immediate attention, it would be exceedingly difficult to build viewer loyalty for a show in which the characters were too unsympathetic or the world portrayed too depressing. The need for repeat viewers partly explains why the world on television looks like such a sanitized and stylized version of the original. Films, on the other hand, as one or two time events, can dedicate a central narrative arc to a lawyer who is a pitiful, drunken failure (*The Verdict*), or to the way in which lawsuits erode communities (*The Sweet Hereafter*), or to a law firm that makes its money by representing the Mafia (*The Firm*). Network television cannot.

#### IV. WHY THIS MATTERS TO DEMOCRACY

Our description of the ideological content of legally themed images in television and film is intended to provide both a broad and nuanced assessment of the styles of ideological communication across two important popular media. More than just descriptive, our analysis implies normative possibilities as well by suggesting the kinds of influence that various ideological portrayals of law might have on our society generally and our democratic institutions specifically. The normative insights are especially important in a world in which our democratic spaces, like the public sphere, are increasingly dependent on popular culture.

While there have been changes in the nature of American mass media that even the Frankfurt School could not have reasonably predicted, many of the developments strongly resemble or elaborate the early images they sketched. Media consolidation is one development that gives the Frankfurt School approach startling salience today. On the one hand, the culture industries have never looked more dominant in their ideological production. On the other, these industries, by providing a kind of forum for mass communication, create opportunities for public critique and resistance. Jurgen Habermas, a second-generation Frankfurt School theorist, focused attention on what he called the "bourgeois public sphere," a realm of accessible institutions for public discussion among private individuals, the space

in which public opinion is formed.<sup>360</sup> The public sphere emerged with the development of territorial states and their distinctions between public authority and private life, mediating between private society and the state by allowing for robust yet informal political participation in the form of discussion and debate among citizens.<sup>361</sup> A public sphere depends on some democratic rights, such as freedoms of association, assembly and speech,<sup>362</sup> and democracy depends on a public sphere in which private individuals come together to form a politically engaged public. "Citizens behave as a public body when they confer in unrestricted fashion . . . about matters of general interest. In a large public body, this kind of communication requires specific means for transmitting information and influencing those who receive it. Today, newspapers and magazines, radio and television are the media of the public sphere."<sup>363</sup>

At one time, in an "industrially advanced mass democracy organized in the form of a social welfare state," coffee houses, assemblies, pamphlets and newspapers were the media of the public sphere; today both the public sphere and the forms of its articulation have changed.<sup>364</sup> First, the public sphere expanded beyond the bourgeoisie. As it became more diverse and more contested, it began to function as a site for the mediation of competing group interests.<sup>365</sup> Second, the channels of communication which facilitate the public sphere became more privatized and commercial. As Habermas notes, "the public sphere was transformed by the influx of private interests, which received special prominence in the mass media."<sup>366</sup> Durham and Kellner elaborate, pointing out the effects of both profit motive and media consolidation on the increasingly privatized public sphere:

[A]s society became more dominated by mass media, powerful corporations came to control major institutions such as newspapers, radio, film and television. These arms of culture industry served the interest of the media conglomerates and the corporations and advertisers who financed them. Thus, in this conjecture, the public sphere was colonized by the big media which came to dominate public life and which recast the public sphere from a locus of information and debate to a site of manipulation by corporate powers.<sup>367</sup>

More recent scholars, writing in the Frankfurt School tradition of critically assessing popular culture as ideological communication, have focused on the effects of an invasion of the public sphere by modern media conglomerates, specifically asking what the impact might be on popular culture content.<sup>368</sup> While

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360. Jurgen Habermas, *The Public Sphere: An Encyclopedia Article*, in KEYWORKS, *supra* note 17, at 102.

361. *Id.* at 104.

362. *Id.* at 102.

363. *Id.*

364. *Id.* at 106.

365. *Id.*

366. *Id.* at 105.

367. *Introduction to KEYWORKS, supra* note 17, at 10-11.

368. *See, e.g.,* EDWARD S. HERMAN & ROBERT W. MCCHESENEY, *THE GLOBAL MEDIA: THE NEW MISSIONARIES OF CORPORATE CAPITALISM* (1997).



much of that impact remains speculative, this article is in part an attempt to show how consistent the ideological messages have been, on television certainly, but also at the movies. Where ideological communication is more varied, the public sphere has a better chance of providing a forum for thought and debate on matters of importance. For example, the availability of some truly independent films during the last twenty years has certainly fostered more diversity in popular culture content and political thought.<sup>369</sup> While images of the law are just one set of many ideological images that appear on television and film, they give a clue to the range of ideas that are out there about our society and its governing institutions. And the evidence is not encouraging. Along with an abundance of crudely ideological messages come an even greater abundance of consumption opportunities. The marketplace of ideas so necessary to democracy is increasingly becoming a marketplace of things. Media consolidation has played an unmistakable role in that transformation.

While the impact of media consolidation is disputed, the fact of it is not. It is clear that since the 1980s there has been a significant deregulation of media ownership, facilitated by both the Federal Communications Commission (FCC) and Congress.<sup>370</sup> The result of increasing deregulation has meant greater concentration of all media in the hands of a few global conglomerates. Twenty years ago, about fifty media companies owned more than half of all film and film distribution companies, broadcast media, newspapers, radio stations, music and publishing companies.<sup>371</sup> Today there are fewer than ten major media conglomerates and their holdings are astounding. Time Warner, Disney, Viacom, News Corporation and General Electric own almost every major media outlet between them. For example, in the area of network and cable television, Viacom owns CBS, UPN, the MTV channels, the Nickelodeon channels, VH1, Comedy Central, and Showtime, to name just a few.<sup>372</sup> Disney owns ABC, the Disney channels, the ESPN channels, the History Channel, E! and others.<sup>373</sup> GE owns ABC and a host of local television stations, and News Corporation owns the Fox channels and an impressive array of local stations.<sup>374</sup> Time Warner owns the WB, HBO, TNT, Court TV and the CNN channels.<sup>375</sup> Together these five conglomerates also own the major film production and distribution companies, including Paramount, Warner Brothers, Castle Rock, New Line, Fine Line, Disney, Touchstone, Miramax, Buena Vista, 20<sup>th</sup> Century Fox, and Universal to mention only some.<sup>376</sup> These companies also own many of the major theater chains, video store chains, music labels, radio stations and

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369. See *supra* notes 329-33 (discussing thematic range of independent films).

370. C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 841 (2002) ("[T]here has been a dramatic reduction in legal restrictions on ownership concentration, especially related to broadcast and cable media and to media cross-ownership.").

371. BEN H. BAGDIKIAN, *THE MEDIA MONOPOLIES* (6th ed. 2000).

372. *Who Owns What*, Columbia Journalism Review (2004), at <http://www.cjr.org/tools/owners/index.asp>.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

publishing houses.

Recently, in addition to the focus on media conglomerates, more and more attention has been paid to the vast and expanding power of one man, Rupert Murdoch, and the impact of that power on the fictional and non-fictional content of popular culture, particularly in light of Murdoch's vast media holdings<sup>377</sup> and his extreme political views.<sup>378</sup> It is the coupling of private media power and public political zealotry that suggests that the ideological control that the Frankfurt School identified and feared in mass media so long ago continues to be a real and perhaps even greater concern today.<sup>379</sup> James Fallows elucidates why this matters if we care about a public sphere:

Our journalistic culture may soon enough resemble that of early nineteenth-century America, in which party-owned newspapers presented selective versions of the truth. News addressed to a particular niche—not simply in its content but also in its politics—may be the natural match to an era with hundreds of satellite and cable channels and limitless numbers of Internet sites. An age of more purely commercial, more openly partisan media leaves out some of the functions that news was until recently expected to perform: giving a broad public some common source of information for making political decisions, and telling people about trends and events they didn't already know they were interested in. . . . That's not exactly Rupert Murdoch's problem, though he helped make it the world's.<sup>380</sup>

Since its creation in the 1930s, the FCC has designed its rules governing broadcast licenses on a soft public sphere theory: to guard against media consolidation so as to protect the public's interest in a broad variety of programming ideas and perspectives.<sup>381</sup> Until the 1980s the FCC "acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as preventing undue concentration of economic power."<sup>382</sup> Indeed, the agency was obligated "to

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377. Murdoch and his immediate family own thirty percent of the shares of News Corp., which in addition to owning all the Fox network and cable channels in the U.S. also owns 20th Century Fox, thirty-five local TV stations, including two each in New York, Los Angeles, and Chicago, the New York Post, the Times and Sun of London, the Weekly Standard magazine, HarperCollins, the major satellite systems in the U.S., England, Australia and Asia. James Fallows, *The Age of Murdoch*, ATLANTIC MONTHLY, September 2003, at 81.

378. See Russ Baker, *Murdoch's Mean Machine*, COLUM. J. REV., May/June 1998, at 51 ("Murdoch uses his diverse holdings . . . to promote his own financial interests at the expense of real news-gathering, legal and regulatory rules, and journalistic ethics. He wields his media as instruments of influence with politicians who can aid him, and savages his competitors in his news columns. If ever someone demonstrated the dangers of mass power being concentrated in few hands, it would be Murdoch."). It should be noted, however, that some of the most radical political commentary on television is seen on *The Simpsons*, which airs on Murdoch's Fox network.

379. This is the topic of the recent documentary about Murdoch and Fox, *OUTFOXED: RUPERT MURDOCH'S WAR ON JOURNALISM* (Cinema Libre 2004).

380. Fallows, *supra* note 377, at 98.

381. Communications Act, 47 U.S.C. § 151 (1934).

382. Federal Communications Comm'n v. Nat'l. Citizens Comm. for Broad., 436 U.S. 775, 780 (1978).

preserve an uninhibited marketplace of ideas".<sup>383</sup> Opponents of deregulation, of which there are many,<sup>384</sup> still believe in this primary directive, particularly in a world in which the public sphere is overwhelmingly media-driven.<sup>385</sup> But Congress has moved in the other direction, increasingly demanding deregulation. Most notably, in 1996 Congress passed the Telecommunications Act,<sup>386</sup> which directed the FCC to revisit and justify its ownership limitations in the interests of a more competitive, deregulated national policy aimed at accelerating private investment in media technologies.<sup>387</sup> Without waiting for FCC action, the 1996 Act also eliminated all limitations on radio ownership, with the result, for example, that Clear Channel Communications promptly went from owning 43 radio stations to 1,225 radio stations—one of every nine stations nationwide.<sup>388</sup>

More recently, as part of its biennial review required by the Telecommunications Act, the FCC proposed regulations which would further relax a number of limitations on media ownership.<sup>389</sup> Particularly controversial were the proposals for easing the local television ownership rule and the newspaper/broadcast cross-ownership rule.<sup>390</sup> With respect to the latter, the FCC had long prohibited common ownership of a television broadcast station and a daily newspaper in the same market out of concern for the ways in which concentrated ownership could influence local news coverage. The 2003 proposed regulations would eliminate the cross-ownership restriction in all but the smallest markets.<sup>391</sup> The result, according to James Fallows, is that "in as many as 180 metropolitan areas the new rules would allow the leading newspaper and the leading TV station to be owned by the same company—something that has until now been outlawed except in a few special-waiver cases. Because the leading newspaper is the only

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383. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

384. See, e.g., HERMAN & MCCHESENEY, *supra* note 368; BAGDIKIAN, *supra* note 371.

385. See Tonya Jameson, CHARLOTE OBSERVER, Mar. 7, 2004, at 1H ("Now that Clear Channel has suspended Howard Stern, the protectors of decency can focus on the real problem—media consolidation. Stern and the Janet Jackson incident remind us that only a few companies control what we hear, see and read. Worse, under new FCC rules, the number of companies controlling the public airwaves may continue to shrink. . . . yet while FCC Chairman Michael Powell and other congressional leaders say they want to clean up the entertainment industry, they continue to give more power to the corporations polluting TV and radio.").

386. Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56, § 202 (1996).

387. S. Rep. No. 104-230 (1996).

388. John Helyar, *Radio's Stern Challenge: The shock jock is leaving AM/FM. Will the industry be shocked out of its torpor?*, FORTUNE, Nov. 1, 2004, at 123.

389. 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13, 620 (2003) [hereinafter July 2003 FCC Review].

390. Also at issue were rules governing radio broadcast and a national television ownership rule, which would have raised the cap on the number of national television stations one entity could own from a limit on reaching more than 35% of the national audience to a new limit allowing a reach of 45% of the national audience. July, 2003 FCC Review. Acting on 342,000 citizen petitions opposed to the new regulations, Senator Byron Dorgan brought the issue before Congress in late 2003. See THE NATION, Oct. 6, 2003, at 6. Despite a 55 to 40 Senate vote to overturn the regulations, Congress quietly passed a funding bill in January 2004 which statutorily raised the cap to allow single ownership of national television stations that reach up to 39% of the national audience. See Jameson, *supra* note 385, at 1H.

391. See Jameson, *supra* note 385, at 1H.

newspaper in the great majority of cities, the new rules would mean that in all but the very largest American cities one news organization could dominate.”<sup>392</sup>

Likewise, the FCC’s local ownership rule was originally meant to prohibit duopolies, in which one company owns more than one television station in a single market.<sup>393</sup> But this rule was honored as much in the breach; for example, there are four duopolies in Los Angeles alone.<sup>394</sup> The new proposed regulations would allow triopolies in the nine largest markets, which reach twenty-five percent of the population, and duopolies in the largest 162 markets, which together reach ninety-five percent of the population.<sup>395</sup> Thus the FCC has for the most part acted in sympathy with proponents of deregulation, who while not disputing the underlying premise that there is value in a diverse array of programs and viewpoints, argue that consolidation will support diversity as owners want to keep stations in the same market from competing with each other.<sup>396</sup> They also argue that more resources will translate into better programming and that other outlets, like the Internet, will ensure the broad dissemination of diverse viewpoints.<sup>397</sup> But although the Internet potentially opens up additional avenues for democratic exchange, the fact is that most people spend most of their online time on sites whose content is dictated by the same media conglomerates who own the other media venues.<sup>398</sup>

The public reacted passionately to the FCC’s proposed rules. Numerous citizen groups who felt the regulations went too far, as well as broadcasting interests who felt they didn’t go far enough, filed lawsuits challenging the proposed regulations. In the consolidated lawsuit, *Prometheus Radio Project v. FCC*, the Third Circuit ultimately upheld a number of the broadcast ownership rules but remanded the cross-ownership and the local ownership rules on the ground that those revisions were unsupported by the evidence.<sup>399</sup>

Despite the public distaste for media consolidation and the partial check provided by the judiciary, the overall legal and regulatory trend is shifting away from protecting the public sphere and towards nurturing the private sphere and the economic interests of media conglomerates. What this revival of *Lochner*-era thinking will mean for a society and political system dependent on the mass media for their democratic communication is the subject of recent scholarship. Edwin Baker, for example, has gone beyond documenting the effects of media

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392. Fallows, *supra* note 377, at 81.

393. See Multiple Ownership, Cross Media Limits, 47 CFR § 73.3555(c).

394. News Corp., NBC, Telemundo and Viacom each own two local stations, although since acquiring Telemundo, NBC owns four. Melinda Myers Vaughn, *Who Owns Your News?*, USC LAW, Spring 2003, at 17.

395. July 2003 FCC Review at 13, 997-98.

396. See, e.g., BENJAMIN M. COMPAINE & DOUGLAS GOMERY, WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY (3rd ed. 2000).

397. *Id.* at 575; Fallows, *supra* note 377, at 81.

398. Baker, *supra* note 370, at 895-99. See also *Prometheus Radio Project v. FCC*, 373 F.3d 372, 405-06 (2004) (noting “a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart”).

399. *Prometheus Radio Project*, 373 F.3d 372, 402-3, 413 (2004).

concentration on the public sphere per se and has focused on the ways in which such concentrations effect a robust democracy. Baker notes an historical shift in the way legal institutions in general, and courts in particular, have thought about the media: where once they were seen as entities primarily valued for their ability to facilitate public, democratic communication, they now tend to be viewed as "rights-bearing units in their own right."<sup>400</sup> The effect, according to Baker, is that law is "giving up on democracy" through the privatization of the public sphere.<sup>401</sup>

Two scholars provide additional ways of thinking about the possible effects of the contraction and privatization of the public sphere, beyond the corrosive influence on democratic participation. Bill McKibben, for one, suggests that there is good reason to think, despite the real explosion in the number and kind of media outlets and channels of communication now available, the amount of actual information we receive is comparably quite restricted. In his book *The Age of Missing Information*, McKibben argues that the information revolution never got off the ground. Although we have much greater access to information than ever before, we know less than ever.<sup>402</sup> We get fragments of information, without context or complexity, instead of knowledge. "We also live at a moment of deep ignorance, when vital knowledge that humans have always possessed about who we are and where we live seems beyond our reach. An unenlightenment. An age of missing information."<sup>403</sup>

Mark Crispin Miller speaks to the expansion of media sources rather than the contraction of ownership and information to argue that the proliferation of mass media sources has done much more than influence media content (for better or worse); it has fundamentally changed the reality that it portrays. Miller notes that whatever the role that mass media played in societies of the past, there has been a media transformation in the United States since the 1970's, growing out of but not exclusively affecting, television. According to Miller, the effect of the explosion of media sources was that instead of being able to track media and advertising expansion as one once could, "one could not now discern TV so clearly (if at all), because it was no longer a mere stain or imposition on some preexistent cultural environment, but had itself become the environment."<sup>404</sup> "By the mid-Seventies,"

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400. Baker, *supra* note 370, at 842.

401. *Id.*

402. See BILL MCKIBBEN, *THE AGE OF MISSING INFORMATION* (1992). McKibben employed a strange, and admittedly nonempirical, experiment to support this assertion. With the help of an army of video machines, he taped "nearly every minute of television that came across the enormous Fairfax [Virginia] cable system" over a period of twenty-four hours, and then sat down over a period of months and watched it all. *Id.* at 9. By way of comparison, he then spent a day a mile from his home, camped on a mountaintop by a small pond, and took a hike, a swim in the pond, cooked dinner, and watched the nighttime sky until he fell asleep. The book provides a comparison of the "information" he was exposed to in the course of watching the "24 hours" of television (which was actually, thousands of hours once he had viewed all the tapes) to that he received during his day in the mountains. *Id.* at 9. As McKibben says of his motivation, "for me the biggest question is not if the world before TV was a better place or if TV leads to violence. [These are] important questions, but they're not my question. My question is 'What's on?'" *Id.* at 17.

403. *Id.* at 9.

404. Miller, *supra* note 89, at 8.

Miller concludes, "TV had started to resemble what it is today: a good 'environment' (as the ad makers say) for advertising."<sup>405</sup>

Miller argues that this dynamic had a definite and universal impact on programming and content of both television and film, film now the more dependant and derivative of the two media; it has even altered its structure to (quite literally) fit the small screen. The ideal advertising environment was created by the production of "exact universal assent, not through outright force, but by creating an environment that would make dissent impossible."<sup>406</sup> Thus Miller's analysis suggests that mass media is so hegemonic as to make democracy almost beside the point. The result, then, of media consolidation and the collapse of a useful distinction between media and non-media "environments," is that the public sphere has become a perfect environment not so much for public debate but for private commerce; democratic values have been replaced with market values.<sup>407</sup>

These various perspectives point to the powerful impact the producers of mass culture have on the political, sociological, psychological, and cultural identity of our society, and of the ever-diminishing number of entities which wield this power. Given this reality, it is critically important to assess what these entities are doing with this power. In this article we have canvassed and assessed what kinds of images of law and legal institutions are being depicted by the mass culture industries and what impact these depictions are having on the society which helps to produce them. Our conclusion is that in both crude and complex ways television and film communicate and reproduce a dominant legal ideology which relies on an ambivalent sense of law and an increasingly unquestioned commitment to a moral order with which law only sometimes aligns itself.

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405. *Id.*

406. *Id.* at 11.

407. Baker, *supra* note 370, at 5. Perhaps this trend is nowhere more evident than in those few events in which the commercials are as important, if not more important, than the programming they make possible. With half of all Americans tuning in for the Super Bowl, advertisers put enormous time and money into Super Bowl ads, spending \$2.2 million dollars for each 30-second spot in 2003. *Big Celebrities and big brands at the "biggest show on Earth,"* CAMPAIGN, Jan. 31, 2003, at 16. Moreover, advertisers also dedicate huge production budgets to making commercials which are "often as extensively trailed in the U.S. media the preceding week as the game itself." Dominic Mills, *Super Bowl, Super Cachet: Ad Hoc*, THE DAILY TELEGRAPH, Jan. 30, 2001, at 36. Indeed, many ads that air during the Super Bowl become part of the pop cultural vocabulary or are considered works of art in their own right. The Budweiser "Whassup" commercial, for example, did both. It is considered the most popular Super Bowl commercial ever, became part of American culture, and won the advertising award at the Cannes Film Festival. *Id.* at 341; Eric King Watts & Mark P. Orbe, *The Spectacular Consumption of "True" African-American Culture: 'Whassup' with the Budweiser Guys?*, CRITICAL STUDIES IN MEDIA COMMUNICATION, vol. 19 no. 1, Mar. 1, 2002, at 1. The line, if there ever was one, between content and consumption, has become sufficiently blurred that millions of viewers now watch the Super Bowl to see the commercials. A report issued by TiVo, a sophisticated taping service, after the 2002 Super Bowl said that although subscribers used TiVo to replay portions of the game, they used it far more often to replay their favorite commercials, with Britney Spears' 90-second "Pepsi through the ages" commercial proving to be the most-often replayed moment of the game. Charlie White, *TiVo Subscribers Vote With Their Remotes, Britney Spears Is Super Bowl MVP*, Digital Media Online, at [http://www.dtvprofessional.com/2002/02\\_feb/features/cw\\_tivo\\_superbowl.htm](http://www.dtvprofessional.com/2002/02_feb/features/cw_tivo_superbowl.htm) (last visited Jan. 19, 2005).

## CONCLUSION

The basic conclusion of our analysis is that American popular culture is far too diverse and complex to lend itself credibly to one description of the role that ideology plays in the substantive content of popular texts. We have aimed in this article to bring together a more precise assessment of the specific features of the two dominant popular media, film and television, with a nuanced understanding of the various ways that legal ideology is developed, communicated and recreated in mass-mediated popular culture. More specifically, we canvas the substantive content of television and film for their abundant images of and arguments about the law in order to assess what those images and arguments can tell us about the legal ideology and popular understandings of legal institutions and the role of law in society.

Our analysis indicates that while all mass-mediated popular culture serves a pervasive ideology-reinforcing role in our society, the models of ideological production endemic to television and film are decidedly different. Due we think to their differences in structuring production, profits and narrative, television more consistently produces quite crude versions of legal ideology while film is more likely to portray more complex images of law and legal institutions. Notwithstanding these differences, a strong ideological message about law's ability to achieve justice in our society is consistently communicated by both media, and neither offers many subversive or counterhegemonic perspectives on law, although film has the greater potential, tantalizingly if rarely realized, to offer truly oppositional messages to at least some viewers.

Viewers of network television see images of law and legal institutions that almost invariably provide a comforting picture of the role that law and legal professionals play in the promotion of justice. Viewers of popular film, on the other hand, encounter a more diverse set of images, some genuinely challenging to the notion that law is a reliable or effective mechanism for achieving justice. But most of us are avid viewers of both media, and the images of law in both rely, as popular texts must to a great extent, on thematic and structural features that are familiar across a wide spectrum of the culture. Thus, even when the audience is allowed to harbor doubts about the integrity of the hero or is deprived a real hero at all, it still shares a common moral foundation that is rarely questioned. When law is screened, a commonly accepted notion of where justice lies is rarely if ever challenged, even in the course of some of the more disturbingly negative depictions of the role of law in our society.

So while film audiences may despair at the sight of the seeming failure of the legal system to bring justice to a paralyzed woman robbed of her life and baby by arrogant and negligent doctors, and cast aside by stingy, disinterested clergy, they are still called upon to have "faith in justice," to rely on an innate understanding of justice (the "justice in our hearts"), and to "act with justice." And not only does everyone know what that means, but in fact "justice" is done. Frank Galvin's closing argument in *The Verdict* provides an able summary of the prevailing attitude toward law communicated in our popular culture—notwithstanding the

relative success or failure of our legal institutions and professionals, there is a mythic, shared and hegemonic sense of justice to which we can turn, and upon which we can all rely. And it is this simple faith in justice that is the primary ideological product of our popular media images of law.



